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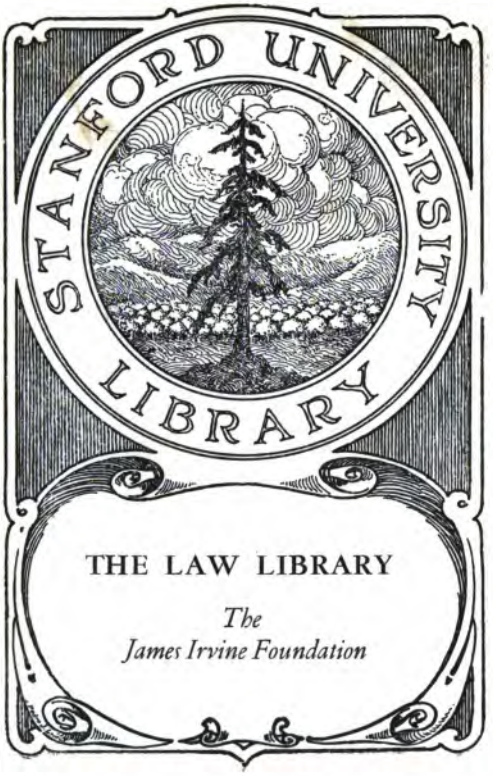

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LECTURES

ON THE

CONSTITUTION AND LAWS OF

ENGLAND:

WITH A

COMMENTARY ON MAGNA CHARTA,

AND ILLUSTRATIONS OF MANY OF THE

ENGLISH STATUTES.

BY THE LATE

FRANCIS STOUGHTON SULLIVAN, LL. D.

ROYAL PROFESSOR OF COMMON LAW IN THE UNIVERSITY OF DUBLIN.

TO WHICH AUTHORITIES ARE ADDED, AND A DISCOURSE IS PREFIXED, CONCERNING THE LAWS AND GOVERNMENT OF ENGLAND.

BY GILBERT STUART, LL. D.

FIRST AMERICAN EDITION.

IN TWO VOLUMES.

VOL. I.

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1805.

TO THE RIGHT HONOURABLE

FREDERICK LORD NORTH,

KNIGHT OF THE MOST NOBLE ORDER OF THE GARTER, FIRST LORD OF THE TREASURY, CHANCELLOR OF THE EXCHEQUER, AND CHANCELLOR OF THE UNIVERSITY OF OXFORD.

MY LORD,

I AM ambitious of giving dignity to this WORK by inscribing it to your Lordship; and I conceive that it has a natural claim to your protection. It regards those laws and that constitution which, at a most critical period, you were called to defend; and of which the important purposes are the security and the happiness of a free people.

In this illustrious rank which divides your cares between prerogative and liberty, and in which you support the lustre of the Crown, while you guard the independence of the subject; the greatest occasions are afforded to distinguish the generosity of public virtue, and to employ a capacity enlarged alike by reflection and experience.

But it does not become me to say with what honour to yourself, and with what advantages to the nation, you sustain the arduous charge of government.—

To posterity, which will not be suspected of flattery, it must be left to celebrate the merits of an administration, too vigorous to yield under difficulties, and of which the glory has increased with the danger.

I am, with the greatest respect,

MY LORD,

Your Lordship's

Most obedient,

And most humble servant,

GILBERT STUART.

ADVERTISEMENT.

THE following lectures were delivered in the University of *Dublin*, and procured a very high reputation to their author. The researches they contain into the nature and history of the FEUDAL LAWS, were esteemed extensive and ingenious; and the description they exhibit of the ENGLISH CONSTITUTION, will be allowed to be particularly interesting. These advantages have occasioned their publication. It was thought, that papers, which had done so much honour to Dr. SULLIVAN, when alive, ought to illustrate his memory; and that they might prove of use to the present age, and to posterity.

The authorities assigned for Dr. SULLIVAN's opinions and reasonings are furnished by the EDITOR. They are not, perhaps, in every instance those to which he himself would have appealed. This could not have been expected. They are such, notwithstanding, as will assist the student; and the prelim-

inary discourse, it is hoped, will not be thought an useless or improper addition to his lectures. It will be a pleasure to the EDITOR to reflect that he has endeavoured to pay a tribute of respect to the writings of a virtuous man and an ingenious lawyer, whom an immature death had ravished from his friends and from society.

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A DISCOURSE

CONCERNING

THE LAWS AND GOVERNMENT OF

ENGLAND.

THE last conquest attempted under the Roman Republic was that of Britain. Julius Cæsar, on the pretence that its states had given assistance to the Gauls, but chiefly from a motive of glory, curried the Roman Eagles into a country from which he was to retreat with disgrace. It required a length of time, and a succession of able Proconsuls to reduce to subjection communities of fierce and independent warriors; and policy effected what could not be operated by arms. The Britains were debauched into a resemblance with a most corrupted people. They renounced the fatigues of war for the blandishments of peace. They forsook their huts for palaces; affected a costliness of living, and gave way to a seducing voluptuousness. They sunk into an abject debasement, without having run that career of great-

ness, which, in general, precedes the decline of nations; and, when they were trained to an oppressive yoke, the Romans found it necessary to abandon them. The impression which the barbarous tribes had made upon the Empire required the presence of the distant legions [1].

The liberty which the Romans, on their departure, presented to the Britains, could not be enjoyed by them. Timid and dastardly, they fled before the Picts and Scots, and allowed their country to be ravaged by a cruel and undisciplined enemy. Amidst the suggestions of their fear, they forgot every principle of policy and of prudence; they called to their defence a foreign valour. The Saxons were invited to fight their battles; but they acted not long as protectors. They were allured by the prospect of compleating a settlement in this island; and the total ruin of its inhabitants was projected. Despair gave a temporary vigour and union to the Britains. They were unable, however, to resist a people, accustomed to victory, and directed by experienced commanders. The valiant and magnanimous fell by the sword; the ignoble submitted to an ignominious servitude:— Wales afforded a retreat to some; and others found shelter in Armorica [2].

1. Cæsar de bell. Gal. lib. 4. c. 18. Tacit. vit. Agric. Dion Cassius, vit. Sever.

2. Bede, lib. 1.

But, if the Saxon conquest was ruinous to the Britains, it was yet attended with consequences which were lasting and important. The sun of liberty revisited the island, and displayed itself with uncommon lustre. The Saxons, independent in their original seats, submitted not to tyrants in their new situation. They laid the foundation of a political fabric, the most valuable that has, at any time, appeared among men; and which, though shaken by violent revolutions, a train of fortunate circumstances has continued down to the present times. Fluctuations have taken place between prerogative and liberty; but, accident and wisdom have still conspired to preserve us from the fate of the other kingdoms of Europe.

During the existence, however, of the Heptarchy, the Saxons seem to have departed little from their original condition of society. The ferocious picture which Tacitus has drawn of the Germans, is, with a few exceptions, characteristic of them. If we admire their heroism, we are shocked with their cruelty; and if we are in love with their democratical maxims, we must sometimes regret their contempt of justice and of order. The most important innovation introduced into their manners during this æra was their conversion to christianity. But their acquaintance with this mode of faith failed to be productive of beneficial consequences. As they re-

ceived it from the corrupted source of the Church of Rome, it involved them in endless and idle disputes. It detracted from the vigour of their understanding, by turning their attention from civil precautions, and the arts of policy, to the relics of saints, and the severities of religious discipline. The power derived from it intoxicated ecclesiastics: they presumed to interfere in affairs of state; and, a foundation seemed already to be laid for subjecting the island to the dominion of the Roman Pontiff[3].

When the Saxon kingdoms were consolidated into one state under Egbert, improvements were made in civility and knowledge. The incursions of the Danes, and the disorders resulting from them, called forth the ability and the wisdom of the Anglo-Saxon princes. Alfred, notwithstanding the other important transactions of his reign, found leisure to frame into a code the laws of his predecessors, and those Germanic customs which had retained their influence. King Edgar has likewise come down to us with the character of an able legislator. The establishment of the Danes in England gave occasion to new usages and new laws; but these were neither many, nor considerable[4]. The ability of Canute

3. Bede, lib. 3. and 5.

4. The division of laws, during the Anglo-Saxon period, into West-Saxon-Lage, Mercen-Lage, and Dane-Lage, was not of any importance. These differed not essentially

did not allow him to make distinctions between his Danish and his English subjects; and the sceptre was not long in returning to a prince of the Saxon line. No monarch was ever more acceptable to a state than Edward the Confessor; and though he had rather the qualities of a saint than those of a king, his laws have been highly extolled. They were strenuously contended for during the administration of the earlier Norman princes; they kept their ground in opposition to the clergy and the imperial institutions; and they furnished the foundation of what is termed the Common Law of England[5].

from one another. "Our Saxons, says Sir Henry Spelman, "though divided into many kingdoms, yet they were all "one in effect, in manners, laws and language: So that "the breaking of their government into many kingdoms, "or the reuniting of their kingdoms into a monarchy, "wrought little or no change amongst them touching laws. "For though we talk of the *West-Saxon-law*, the *Mercian-law*, and the *Dane-law*, whereby the west parts of *England*, the middle parts, and those of *Norfolk*, *Suffolk*, and "the north, were severally governed; yet held they all an "uniformity in substance, differing rather in their *mulcts*, "than in their *canea*; that is, in the quantity of fines and "amerciaments, than in the course and frame of justice." *Relig. Spelm.* p. 49.

5. King Edward's laws were compiled from those of former princes, and abolished any little peculiarities which distinguished the West-Saxon, Mercian and Danish laws, subjecting the whole kingdom to a common law. His code, accordingly, was termed *lex Angliæ*, or *lex terræ*. No correct copy of it has descended to us. Those regula-

In no portion of the Anglo-Saxon period does the power of the Sovereign appear to have been exorbitant or formidable. The enaction of Laws, and the supreme sway in all matters, whether civil or ecclesiastical, were vested in the *Wittenagemot*, or great National Assembly[6]. This council consisted of King, Lords, and Commons, and exhibited a species of government, of which political liberty was the necessary consequence; as its component parts were mutually a check to one another. The free condi-

tions, which pass under his name in the editions of the Saxon-laws by Lambard and Wilkins, have evidently some interpolations. Traces of them are to be seen in Hoveden and Knyghton; and remains of them are likewise to be found in the laws of William I. From the time of this Prince to that of King John, they continued, with the addition of some Norman laws and customs, the law of the land. *Præcipimus*, says William, *ut omnes habeant et teneant leges Edwardi regis in omnibus rebus, adauctis his quas constituimus ad utilitatem Anglorum. Leg. Guliel. ap.* Wilkins, p. 229. By the influence of the Barons under the last Prince, they were drawn up in the form of *Magna Charta*. For the *great charter* was not what some partial writers have represented it, a concession of privileges extorted by violence, but a declaration of the principal grounds of the *ancient* and fundamental laws of England, and a correction of the defects of the common law. See *Lord Coke 2 Inst.* and *Lord Lyttleton's Hist. of Henry II.* vol. 1, p. 42, 526.

6. *Wittenagemot*, imports a council of wise men; the Saxon word *witta* signifying a wise man; and the British word *gemot* expressing a synod or council. During the Heptarchy, each kingdom had its *Wittenagemot*.

tion of the northern nations, and the peculiarity of their situation when they had made conquests, gave rise to this valuable scheme of administration, and taught the politicians of Europe, what was unknown to antiquity, a distinction between despotism and monarchy.

The executive power remained with the crown; but it was the united assent of the three estates which constituted the legislature. The Lords were spiritual as well as temporal; for notwithstanding that the Ecclesiastics preached humility, and the contempt of private interest, they had been seized with ambition and the love of superiority[7]. The people exercised an authority that was important and

7. The lay lords were the earls, thanes, and other nobility of the kingdom. The spiritual lords were the bishops and dignitaries of the church, whose possessions were held in frankalmoigne. After the conquest, they were subjected to military service and held by barony. What may seem extraordinary, Abbesses were also in use to sit in the Saxon Wittenagemots. In Wightred's great council at Beconceld, *anno* 694, the Abbesses sat and deliberated, and several of them subscribed the decrees made in it. *Spel. conc.* vol. 1. The Abbesses appeared also in Ethelwolf's parliament at Winchester, *anno* 855. *Ingulph, edit. Savil.* 862. And king Edward's charter to the abbay of Croyland was subscribed by an Abbess. Even in the time of Henry III. and in that of Edward I. it appears that four Abbesses were summoned to parliament; those of Shaftsbury, Berking, St. Mary of Winchester, and of Wilton. *Tit. hon.* p. 729. *and Whitelock's notes upon the king's writ for choosing members of Parliament*, vol. 1. p. 479, 480.

ample. The counties appeared by their knights, and the cities and boroughs by their citizens and burgesses; the Commons, as at this day constituted, being included under the appellation of the *wites* or *sapientes*, who are always mentioned, as a part of the Anglo-Saxon parliament[8]. The assertors of pre-

8. The preambles of the Saxon laws express an anxiety to please the people, and allude to their consent in enacting them. The laws of king Ina begin thus: *Ego Ina Dei gratia Occiduorum Saxonum Rex, cum consilio et cum doctrina Cenredæ patris mei, et Heddæ Episcopi mei, et cum omnibus meis senatoribus, et senioribus* SAPIENTIBUS POPULI MEI, *et multa etiam societate ministrorum Dei, consultabam de salute animæ nostræ, et de fundamento regni nostri, ut justæ leges, et justa statuta per ditionem nostram stabilita et constituta essent, ut nullus senator nec subditus noster post hæc has nostras leges infringeret.* See *LL. Anglo-Saxon, ap. Wilkins*, p. 14. The preambles to the laws of the other princes are nearly similar; and those of Edgar, Ethelred and Canute, may serve as additional examples. 1. Leges Eadgari regis. *Hoc et institutum quod Eadgarus cum* SAPIENTUM SUORUM *consilio instituit in gloriam Dei, et sibi ipsi in dignitatem regiam, et in utilitatem omni populo suo.* 2. Leges Æthelredi regis. *Hoc est consilium quod Æthelredus rex, et* SAPIENTES EJUS *consultaverint ad emendationem pacis omni populo Wodstoci in regione Merciorum, secundum Angliæ leges.* 3. Leges Cnuti regis. *Hoc est consilium quod Cnutus rex, totius Angliæ et Danorum et Norwegorum rex, cum* SAPIENTUM SUORUM *consilio sancivit, in laudem Dei, et sibi ipsi in ornamentum regium, et ad utilitatem populi; et hoc erat sacris natalibus domini nostri Wintoniæ.* See *Wilkins*, p. 76, 102, 126.

In the 8th law of Edward the Confessor we read, *Hæc concessa sunt a rege, baronibus et* POPULO; and in his 35th

rogative, indeed, have affirmed that these were judg-

law we have the following words: *Hoc enim factum fuit per* COMMUNE CONSILIUM *et* ASSENSUM *omnium episcoporum, principum, procerum, comitum, et omnium* SAPIENTUM *seniorum et* POPULORUM *totius regni, et per præceptum regis Inæ prædicti.* See *Wilkins*, p. 198. The laws of Edward are, I know, to be read with distrust; but they are allowed to contain genuine relics of that prince; and in the present case, there seems no reason for suspicion. Their *appeal* of consequence to the *assent* of the *people* must be allowed to be of authority. For, if such *assent* was not known and believed in that age, how is it possible that they could appeal to it? The advocates for the late origin of the house of Commons will not surely suppose, that the Confessor alluded prophetically to transactions which were not to happen till the reigns of Henry III. and Edward I.

In the *Mirroire de Justices*, it is expressly said, that no king, during the Saxon times, could change his money, nor enhance nor impair it, nor make any money but of silver, without the *assent* of the *Lords* and all the COMMONS. Part of this book is conceived by Sir Edward Coke to have been written before the conquest; and additions were made to it by Andrew Horn in the reign of Edward I. from old MSS. the authors of which must have seen ancient rolls and records. Matter, also from more exceptionable materials, it is to be thought, was superadded by him. The book is notwithstanding of considerable weight and authority. *Mirroire des Justices*, cap. 1. sect. 3. *Atkyns on the power of parliament.*

Concerning the high antiquity of the *commons*, Sir Edward Coke is clear and explicit; and he has founded chiefly his opinion on the ancient tract, which bears this title: *Modus quomodo parliamentum regis Angliæ et* ANGLORUM SUORUM, *tenebatur* TEMPORIBUS REGIS EDWARDI, *filii* REGIS *Ethelredi, qui modus recitatus fuit per discretiores regni coram Willielmo duce Normanniæ conquestore et*

es or men skilled in the law; but this opinion they

rege Angliæ, ipso conquestore hoc præcipiente, et per ipsum approbatus, et suis temporibus et temporibus successorum suorum regum Angliæ usitatus. Other authors beside Lord Coke have paid great respect to this treatise. It is to be acknowledged, however, that Mr. Selden has demonstrated that this tract could not possibly be of the age of the Confessor, from its employing terms which were not in use till long after. But this does not wholly derogate from its force as to the point in question. For, allowing it to have been written in the reign of Edward III. the period which, with great probability, some writers have assigned to it, it yet proves that the sense of that period was full and strong with regard to the antiquity of the constitution, as consisting of king, lords and *commons*; a circumstance which must have great weight in opposition to those who would make us believe, that our constitution, as so formed, was unknown till the times of Henry III. and Edward I. 4 *Institute*, p. 2, 12. *Selden, tit. hon.* p. 739, 743.

"In the time of king Canutus, says Whitelocke, to a "charter then graunted to the monastery of St. Edmond's "Bury (probably in a publique councell) after the sub-"scriptions of the queen and dukes, followes, *I Oslaus*, "KNIGHT, *I Thored*, KNIGHT, *I Thurkell*, KNIGHT, and so "of others. How many these were, or how for several "counties, doth not appear; nor in that parlement of the "same king (for so is testifyed by the description of it) "where it is sayd, that *the king calling all the prælats of "his kingdome, and the nobles, and great men to his parle-"ment*, there were present bishops, abbots, dukes, earles, "*with many* MILITIBUS, butte the certain number is not ex-"tant; nor of those which are mentioned in the parlement "of Edward the Confessor, where, after the king, "queen, archbishops, bishops, abbots, king's chapleins, "Thaines, KNIGHTS are reckoned in that parlement."— *Notes upon the king's writ*, vol. 1. p. 437.

support by very exceptionable evidence[9]: And it has been conjectured, with no measure of propriety, by some compromising writers, that all the more

Lambard, Dugdale, and other antiquaries, produce a very strong evidence of the antiquity of the representation of boroughs by evincing "That in every quarter of the "realm, a great many boroughs do yet send burgesses to "parliament, which are nevertheless so ancient, and so "long since decayed and gone to nought, that it cannot be "shewed that they have been of any reputation at any time "since the conquest; and much less that they have "obtained this privilege by the grant of any king succeed-"ing the same. So that the interest which they have in "parliament groweth by an ancient usage before the con-"quest, whereof they cannot shew any beginning." *Lambard Archeion.* p. 256, 257. *Coke Epist.* 9. *Rep. Dugdale, Jurid.* p. 15.

This matter receives confirmation from what we are told of the *boroughs of ancient demesne*. "These, says "Whitelocke, were tenants of the demesne lands of Wil-"liam I. and of Edward the Confessor; who (to the end "that they might not be hindered from their business of "husbandry of the king's lands) had many privileges, "whereof one was, that they should not be compelled to "serve in parliament. Another was, that they should not "contribute to the wages of the KNIGHTS OF THE SHIRE. "Which privileges they still enjoy, and had their begin-"ning in the times of William I. and of the Confessor, "whose tenants they first were, as appears in the book of "Domesday, and is a strong proof that KNIGHTS and BUR-"GESSES were then in parliament." *Notes upon the king's writ*, vol 11. p. 139.

See also the 22d note to the present tract.

9. The law was not then a particular profession.

considerable proprietors of land had a title, without any election, to give their votes in the Wittenagemot[10].

In inferior assemblies, and in the forms of judicial proceedings, the marks are also to be traced of the power of the people, and of a limited administration. The hundred and county courts were admirably calculated for the protection of the subject. They were composed of *freeholders*, who were bound, under a penalty, to assemble at stated times; and who with the hundreder, earl and bishop, gave decision in all matters of civil, criminal, or ecclesiastical import. A very powerful obstruction was thus created to the oppressions of the great. And, in the institution of

10. On the following record in the register of Ely, this notion seems to be founded. *Abbas Wulfricus habuit fratrem, Guthmundum vocabulo; cui filiam præpotentis viri in matrimonium conjungi paraverat; sed quoniam ille XL. hidarum terræ dominium minus obtineret, licet nobilis esset, inter proceres TUNC nuncupari non potuit.* It is somewhat remarkable that Mr. Hume is among those, who, resting on this foundation, would make us conceive, that a person who had 40 hides of land, could, without being noble, give his voice in the Wittenagemot. *Hist. of Eng.* vol. 1. p.145. The passage, however, properly understood, serves to shew, that, in the course of time, the attendance of the nobles in parliament having been deemed an expensive service, a law was made to relieve those of them from it who were not possessed of 40 hides of land. The reader may consult *hist. Eliens. c.* 36, 40, *ap. Gale*, the authority appealed to by Mr. Hume.

a *jury*, our ancestors possessed a bulwark, the most efficacious and noble that human wisdom has ever devised for the security of the persons and possessions of men[11].

Nor was the condition of those times so entirely destitute of grandeur as some historians have been fond to assert. Even in the age of Tacitus, London was a port not unknown to navigators and traders[12]; and we have the authority of Bede, that England abounded at an early period with cities which were wealthy and populous[13]. Alfred was particularly attentive to encourage industry, trade and manufactures; and even imported the luxuries of life from the most distant countries[14]. It was a law of Ath-

11. It is perhaps impossible to ascertain the æra of this invaluable institution. It loses itself in a distant antiquity. The Saxon laws mention it as a known invention. See *L L. Ethelr.* c. 4. *Senat. Consult. de Mont. Wal.* c. 3. *ap. Wilkins.* See also *Nicholson*, *Præfat. ad Leg. Anglo-Sax. Spelm. Gloss.* and *Coke's* 1*st Institute*. Olaus Wormius traces it to a remote age among the Danes; and Stiernhook among the Swedes. *Monument. Dan.* lib. 1. c. 10. *De Jure Sueon. et Goth. vetusto.* c. 4.

12. Annal. lib. 14. c. 33. *Copia negotiatorum et commeatuum maxime celebre.* The city of London in the Danish times was able to pay L.11,000 as its proportion of 70,000, a tax then imposed on the nation. Asser, in the life of Alfred, refers to above 120 cities, boroughs and villages.

13. Lib. 1. See also Holingh. Chron. p. 192.

14. Spelman, life of Alfred, b. 2. p. 28. Malmesb. lib. 2. c. 4. A writer in Du Chesne having occasion to mention the first return of duke William to Normandy, after

elstane, that the merchant who had performed at his own expence three long and hazardous voyages, should be invested with nobility[15]. Civility and knowledge, commerce and wealth increased under Edgar, whose ability and affable manners allured many foreigners to his court; and affairs did not degenerate, nor was England less respectable under the peaceful and fortunate administration of Edward the Confessor.

But the beautiful pre-eminence on the side of the people, enjoyed during the Saxon times, was soon to be violated. The invasion of the duke of Normandy was about to introduce sanguinary and oppressive times. We must not, however, with a multitude of authors, be deceived into the opinion, that this warrior and statesman atchieved a *conquest* over the constitution and the people of England. He made effectual by arms his right of succession to Edward; but he received the crown with all its inherent properties. He took the oath which had been prescribed to the Saxon princes; he acknowledged himself to be equally under restraint and limitation; and he engaged to preserve the immunities of the church,

his invasion of England, has the following passage: *Attulit quantum ex ditione trium Galliarum vix colligeretur argentum atque aurum: Chari metalli abundantia multipliciter Gallias terra illa [Anglia] vincit. Gest. Gul. Conques.* p. 210.

15. LL. Anglo-Saxon, ap. Wilkins, p. 71.

and to act according to the laws. The victory he obtained at Hastings was over the person of Harold, and not over the rights of the nation [16].

16. The Confessor dying without issue, the competitors for the crown were Edgar Atheling, Harold, and duke William. The first had not capacity to sway the sceptre; and the succession of kings was not yet directed by very regular maxims. Harold was a subject, and in possession of no legal claim. William was related to Edward, and urged the destination of that prince to succeed him. On these grounds he invaded England; and by opposing Harold, he meant to secure what was his right of succession. His victory accordingly gave him the capacity of a successor, and not of a conqueror. That the quarrel was personal with Harold may be even conceived from the circumstance that duke William offered to decide their dispute by single combat. *Hale, hist. of the common law*, c. 5. *Cook, argument. antinorm.*

With regard to William's right of succession, the best account appears to be that which is found in Ingulphus, William of Poictiers, William Gemetensis, and Ordericus Vitalis, who were all of them his cotemporaries. These authors inform us, that king Edward sent Harold into Normandy to assure duke William of his having destined him to be his successor to the crown of England; a destination which he had before observed to him by Robert Archbishop of Canterbury; and which appears to have been made with the consent of the national council. And of this relation there remains a very curious and decisive confirmation. It is a tapestry found at Bayeux, and supposed to be the work of Matilda the wife of duke William, and of the ladies of her court, in which Harold is represented on his embassy. See *a description of this tapestry by Smart Lethieullier, Esq. ap. Du Carrel's Anglo-Norman antiquities.* It is surprising, when these particulars are considered, that Mr. Hume should have given his sanction to

His accession, at the same time, it will be allowed, was a source of inquietude and confusion. Dominion is ever consequent on property; and the forfeited estates of the nobility and the landed proprietors who had assisted Harold, or who had afterwards joined in insurrections, having been bestowed by him on his officers; and the high rank of many of these requiring very ample retributions, a great proportion of territory was necessarily vested in the hands of a few. Nor was it favorable to the spirit of democracy, that the donations of William were governed by the more extended notions of the feudal law.

This polity, which was common to the northern tribes, had not been unknown to our Saxon ancestors; but, though they were familiar with grants, which were precarious, or which endured for a term

the opinion that William's right was entirely by war, and that he should have conceived that those who refuse to this prince the title of *Conqueror*, should rest solely or chiefly on the pretence that the word *conqueror* is in old books and records applied to such as make an acquisition of territory by any means. *Hist. of Eng.* vol. 1. p. 200. It is true, that Sir Henry Spelman and other antiquaries have shown, that *conquestus* and *conquisitio* were in the age of duke William synonymous with *acquisitio*; but it is no less true, that the authors who refuse to duke William the title of Conqueror, rest on much superior evidence. It is not with pleasure that I differ from this great authority; but, no man has a title to inquire who will not think for himself; and the most perfect productions of human wit have their errors and their blemishes.

of years, or during the life of the feudatory, they had seen few examples of the perpetuity of the fief.... They had not been accustomed to the last step of the feudal progress; but a tendency to its establishment was observable among them; and, if the invasion of William had never taken place, the institutions of this law had yet arrived at their highest point. He only hastened what the course of time was about to produce by slow degrees: It was a result of his administration, that, before the end of the reign of Henry II. fiefs, in their more enlarged condition, had spread themselves over England [17].

This plan of political law, which had been propitious to *liberty* and conquest in its rise, was prejudicial to both in its decline; and the same institutions, which in one situation, conducted to greatness, led the way in another to confusion and anarchy [18].... The advantages which distinguished their earlier state, were unknown when they had obtained the ultimate step of their progress. When fiefs had become hereditary, the association of the chief and the retainer, or the lord and his vassal, had no longer for its support, any other tie than that of land [19]: and, if the possessor of a fief was less attached to his fol-

17. See farther, an Historical Dissertation concerning the antiquity of the English constitution. Part 2.

18. Ibid.

19. Ibid.

lowers, he was less dependent on, and less connected with his prince. The system had lost the circumstances, which formerly had fitted it so admirably for war; and the few regulations it included with regard to peace and domestic policy, were rather calculated for the narrow circle of a nascent community, than for the complicated fabric of an extensive empire.

The exorbitant grants, which it was necessary that duke William should make, the full establishment of the perpetuity of the fief, and the consequent investment of offices of rank and of dignity in particular families, introduced all the disorders of aristocracy. The most princely dominion was in general claimed and exercised by the great [20]. They assumed the right of declaring war against each other of their private authority; they coined money; and they affected to exert without appeal every species of jurisdiction. But while they disputed in the field the prize of military glory, or vied in displays of mag-

20. It is a very curious fact, that even some of the Anglo-Saxon nobles had all the prerogatives of earls-palatine. Alfred, we are told, put to death one of his judges for having passed sentence on a malefactor for an offence which had been committed *where the king's writ did not pass. Mirroire de Justices*, c. 5. And in Selden we meet with earls who had entirely the civil and criminal jurisdiction in their own territories. *Tit. Hon.* part 2. c. 5. If there were no other proofs than these, they would be sufficient to evince the reality of fiefs among the Anglo-Saxons.

nificence and grandeur, their tenants and vassals were oppressed to supply their necessities; and, amidst the unbounded rapine and licentiousness which arose, no legal protection was afforded to individuals [21]. There was no safety for the helpless but in associations with the powerful; and to these they paid attention and service. The tribunals of justice became corrupted; and decisions were publicly bought from the judges. New sources of oppression were thought of; and none were infamous enough to be rejected. The feudal casualties were exacted with the most rigorous severity; and, while the kingdom appeared to be divided into a thousand principalities, the people were nearly debased into a state of servility.

On a superficial view, one would be apt to imagine, that, in regard to competition, the nobles of those times were considerably an overmatch for the prince. But Barons, whose chief recommendations were the military virtues, who were haughty and independent, and often inflamed against each other with the fiercest animosity, could not always act in a body, or by fixed and determined maxims. It was not so with the sovereign: The master of operations,

21. Madox, hist. of Exchеq. *Erant in Anglia quodammodo*, says an old writer concerning the age of Stephen, *tot reges vel potius tyranni, quot domini Castellorum. Gul. Neubrigens.*

which depended on himself, he could speculate in silence, and watch the opportunities of action. The advantages he derived from his situation were powerful. Not to mention his prerogatives and his revenue; the returns of feudal service reminded the nobility of their subjection to him; and the inferior orders of men, regarding these as their immediate oppressors, looked up to him as to their guardian.

Amidst the lawless confusion introduced by the struggles between regal and aristocratical dominion, the constitutional rights of the Commons seem to have received a temporary interruption, and to have been insulted with a temporary disregard. Their assembling in parliament grew to be less frequent and less effectual; and for a season, perhaps, was altogether suspended. But notwithstanding the disorder occasioned by these struggles, they were in time productive of effects which were beneficial to the people. For if the charter, confirming their *ancient* liberties, which was granted by Henry I. renewed by Stephen, and continued by Henry II. had remained without a due and proper force; the confederacy of the barons produced under king John and Henry III. the revival and the exercise of the most important privileges. The MAGNA CHARTA brought back, in some measure, the golden times of the Confessor.... It appeared to the barons, that they could not expect the assistance of the people, if, in treating with John,

they should only act for their own emolument; they were therefore careful that stipulations should be made in favour of general liberty. The people were considered as parties to transactions which most intimately concerned them. The feudal rigours were abated; and the privileges, claimed by the more dignified possessors of fiefs, were communicated to inferior vassals. The cities and boroughs received a confirmation of their *ancient* immunities and customs [22]. Provisions were made for a proper execution of justice; and in the restraints affixed to the power of the king and the nobility, the people found protection and security.

The sovereign, no less than the nobles, was an enemy to public liberty; and yet both contributed to establish it. Stephen gave the example of a practice, which as it served to enfeeble the aristocracy, was not forgotten by his successors. In the event of the reversion to the crown of a great barony, he gave it away in different divisions; and the tenants *in capite* produced in this manner, threw naturally their influence into the scale of the commons. The partitions, also, which the extravagance of the nobili-

22. *Civitas London. habeat omnes* ANTIQUAS LIBERTATES *et* LIBERAS CONSUETUDINES SUAS *tam per terras quam per aquas. Præterea volumus et concedimus quod* OMNES ALIAE CIVITATES *et* BURGI *et* VILLAE *et* PORTUS *habeant* OMNES LIBERTATES, *et* LIBERAS CONSUETUDINES SUAS. *Magna charta ap. Blackstone, Law Tracts*, vol 3. p. 21.

ty, and the failure of male-heirs, introduced into great estates, contributed to restore the democracy. It was a result, likewise, of the madness of the Crusades, that many adventurers to the east returned with more cultivated manners, and more improved notions of order and liberty; and the romantic glory of acquiring a renown there, had induced many potent barons to dispose of their possessions. The boroughs hastened to recover the shock, which they had received during the violent administrations of William and of Rufus[23]; and, if charters of corporation and community were granted seldom during the reigns of Henry I. and of Stephen, they were frequent under Henry II. Richard I. king John, and Henry III. During the sovereignty, accordingly, of the last, and during that of Edward I. the acquisitions secured by the Commons appeared so considerable, that their assembling in parliament became a matter of greater regularity, and they rose to their ancient importance from the disorder into which they had been thrown during agitated and turbulent times.

23. They had suffered considerably, even from the time of the Confessor to that of Domesday-book. Authors ought therefore to be cautious in reasoning back from that monument to the Saxon period. It is a pity, that the survey of the kingdom taken by Alfred did not yet remain. The comparison of it with that of William would lead to very curious discoveries.

The 49th year of Henry III. and the 23d year of Edward I. which so many writers consider as the dates of the establishment of the Commons, were, of consequence, nothing more than memorable epochs in their history [24].

24. The first summons of knights extant on record is supposed to be in the 49th of Henry III. But this, though it were true, does not prove that knights were not known till that time. The writ does not say so; nor can it be gathered from it, that *knights of the shire* were then *newly* established. If there remained, indeed, an uniform series of records from the earliest times, in which there was no mention of *knights* till the age of Henry III. there might thence arise a strong argument against their antiquity.... But this is not the case; and it happens, that in the 15th year of king John, there is a writ to the sheriff to summon FOUR *knights of the county*; 15. *Jo. Rs. rot. claus. pt.* 2. *m.* 7. *dorso.* 4 *discretos milites, de comitatu suo, ad loquendum nobiscum.* There is also similar evidence, that in the 32d and 42d years of Henry III. *knights* made their appearance in parliament. *Whitelocke, Notes,* vol. 1. 438. vol. 2. 120. In the close roll, also, of the 38th year of Henry III. there is extant a writ of summons directed to the sheriffs of Bedfordshire and Buckinghamshire, requiring TWO *knights* to be sent for each of these counties.... *Lyttelton, Hist. Henry II. notes to the 2d book,* p. 70, 79.... In ancient times, it was usual to summon sometimes FOUR *knights*, sometimes THREE, sometimes TWO, and even sometimes ONE *knight*. But from the reign of Edward III. it has been the constant practice for the sheriff to return TWO *knights* for each county. *Whitelocke,* vol. 1. 439.

The first summons directed to the sheriff for the election of *citizens* and *burgesses*, is supposed to be in the 23d of Edward I. But in the sixth year of king John, says

Under Edward I. the constitution received a stability to which it was no less indebted to his military than his civil capacity. The wars and expeditions in which he engaged, involved him in immense ex-

Whitelocke, there is extant on record a writ to the sheriff, which mentions, "Bishops, earls, barons, and *all our faithful people in England*; by whose assent, lawes were then "made." 6. *Jo. regis, rot. claus. m.* 3. *dors. et rot. pat. m.* 2. *Assensu archiepis. &c. et omnium fidelium nostrorum Angliæ. Notes on the king's writ*, vol. 2. p. 120. An ordinance in this year of king John, directed *to all the sheriffs* in England, is mentioned from the records by Sir Robert Cotton, and has these words: *Provisum est* ASSENSU *Archiepiscoporum, comitum, baronum, et* OMNIUM FIDELIUM NOSTRORUM ANGLIÆ. *Cotton. posth.* p. 15.

In the *conventio inter regem Johannem et barones* the people are stated as parties; a circumstance which would not have happened if they had not been represented. *Hæc est conventio facta inter dominum Johannem regem Angliæ ex una parte, et Robertum filium Walteri Marescallum, &c.* ET LIBEROS HOMINES TOTIUS REGNI *ex altera parte*. Blackstone's edition of the charters, ap. Law Tracts, vol. 2. p. 39, 40. And what confirms this notion is, that we find the *mayor of London* and the *constable of Chester* in the list of those who were chosen conservators of the public liberties in consequence of the great charter. Other proofs, likewise, of the antiquity of the commons are to be found in the great charters. See Lyttleton, Hist. Henry II. Notes to the 2d book, p. 71.

It is also worthy of notice, that the 25th of Edward I. which confirms the great charter, observes that it was made by the *common assent of all the realm*: And the 15th of Edward III. observes, that it was made *par le roy, ses piers, et la communalte de la terre.*

Nor must it be omitted, that the 5th of Richard II. has

pence; and calling for supplies, rendered him particularly attentive to the people. The feudal force of the kingdom could not be employed by him with efficacy. In the decline of the gothic system, the nobles were not sufficiently in subjection to the prince;

this remarkable passage: *The king doth will and command, and it is assented in the parliament, by the prelates, lords and* COMMONS, *that all and singular persons and commonalties, which from henceforth shall have the summons of the parliament, shall come from henceforth to the parliaments in the manner as they are bound to do, and have been accustomed within the realm of England* OF OLD TIMES. *And if any person of the same realm, which from henceforth shall have the said summons (be he archbishop, bishop, abbot, prior, duke, earl, baron, banneret,* KNIGHT *of the shire,* CITIZEN *of city,* BURGESS *of borough, or other singular person, or commonalty) do absent himself, and come not at the said summons (except he may reasonably and honestly excuse himself to our lord the king) he shall be amerced, and otherwise punished, according as* OF OLD TIMES *hath been used to be done within the said realm in the said case. And if any sheriff of the realm be from henceforth negligent in making his returns of writs of the parliament; or that he leave out of the said returns* ANY CITIES OR BOROUGH WHICH BE BOUND AND OF OLD TIME WERE WONT TO COME TO THE PARLIAMENT, *he shall be amerced, or otherwise punished in the manner as was accustomed to be done in the said case* in times past. Stat. 2. cap. 4.

The expression "of old time," so often used here, must doubtless carry us farther back than the 23d of Edward I. or even the 49th of Henry III. The space of two or even three reigns does not make a period of antiquity. We do not say that the accession of George I. was in *ancient times*.

I know well, that the expressions *commonalty, communitas regni, baronagium Angliæ, magnates, nobiles, proceres,*

and their service was limited to a narrow period. In the reign, indeed, of Henry II. a pecuniary payment had been substituted in the place of the personal attendance of the military vassal; and the custom had prevailed of hiring soldiers of fortune. But, amidst the prevalence of private and mercenary

&c. have been considered as solely applicable to barons and tenants *in capite*. But one must beware of giving credit to this opinion. The great charter of king John bears to have been made *per regem, barones et liberos homines totius regni*; a certain proof that it was not made by the king and barons only; yet Henry III. speaking of this parliament, calls it *baronagium Angliæ*. The *magnates* and *proceres* are said to have made the statute of Mortmain; but it is well known, that the parliament which gave authority to this act, consisted of king, lords and *Commons*. In the 35th year of Edward I. the expression *cum comitibus, baronibus, proceribus, nobilibus, ac communitatibus*, evidently refers to KNIGHTS, CITIZENS and BURGESSES: And in the 14th of Edward III. *commonalty* and *Commons* are used as synonymous. See farther, *Whitelocke*, vol. 2. c. 31. *Coke*, 2*d Inst*. 583. *Petyt*, *Rights of the Commons*. *Atkyns*, *on the power and jurisdiction of the parliament*.

Mr. Hume, I am sensible, strenuously asserts the late origin of the Commons; and one would almost imagine, that his history of England had been written to prove it. His reasonings, however, on constitutional points, do not appear to me to be always decisive; and it is with pain I observe the respect which this great man has paid to the opinions of Dr. Brady; a writer who is known to have disgraced excellent talents, by pleading the cause of a faction, and giving a varnish to tyranny.

The brevity which was necessary to this tract, has permitted me rather to hint at, than to treat of the antiquity of the Commons. In a work which I hope one day

views, the generous principles which had given solidity to the feudal fabric [25] having totally decayed, and the holding by a military tenure having ceased to be considered as an honour; vassals thought of eluding the duties to which they were bound by their possessions, and granting them away in fictitious conveyances, received them back under the burden of elusory or civil donations. It even grew to be usual among tenants to refuse the pecuniary payments, or the *scutages* to which they were liable: They denied the number of their fees; they alledged that the charge demanded of them was not justified by their charters; and, while the prince was ready to march against an enemy, it was not convenient to look into records and registers. The sovereign, deprived of his service, and defrauded of his revenue, and under the necessity of levying a military force, had no resource so secure or abundant as the generosity of the people [26].

to lay before the public, I shall have an opportunity of entering into it at greater length.

25. Hist. Dissert. concerning the antiq. of the English constitut. part. 2.

26. *Madox, hist. of the Exchcq. Bar. Angl.* The granting of supplies to the sovereign, naturally suggested to the people the petitioning for redress when under the pressure of any grievance; and the crown, where it expected much, would not naturally exercise a rigorous severity.

The term *petitioners* indeed, has, by some authors, been considered as reproachful to the *Commons*; but how a pe-

The admirable improvements with which Edward enriched the laws, and facilitated the preservation of domestic peace and order, contributed also with the greatest efficacy to advance and secure the liberties of England. He established the limits of the different courts; he gave a check to the insolence and encroachments of the clergy; he abrogated all inconvenient and dangerous usages; and the great charter, and the charter of the forest, received from him the most ample settlement [27]. The sagacity of his

tition, as the spring of a law, could have meanness in it, is inconceivable. Even in the free age of Charlemagne, this mode of application was employed. *Baluz. capit. reg. Franc. tom.* 1. The behaving with reverence to the sovereign is very different from acting with servility. And as to the petitioning against grievances, it is to be remembered, that respectful requisitions of ancient and constitutional privileges, which had suffered invasion, are not to be considered as mean solicitations for acts of favour.

27. *Conf. Cart. an.* 25. *Ed. I.* It is singular, that even after the times of Edward I. some writers will not allow that the Commons were any essential branch of the legislature; yet the writ of summons expresses in strong terms their right of assent: *Ad audiendum et faciendum et consentiendum;* and a multitude of examples may be produced of their actually consulting and determining about peace and war, and other important matters of state.

There is evidence that Edward I. called a parliament, and consulted with the Lords and *Commons* about the conquest of Wales, and that on receiving information that the French king intended to invade some of his dominions in France, he summoned a parliament *ad tractand. ordinand. et faciend. cum prælatis, proceribus et aliis incolis regni qui-*

precautions and policy procured to him most deservedly the name of the *English Justinian*; and it may

buslibet, hujusmodi periculis et excogitatis malis sit objurand. Inserting in the writ these memorable words, *Lex justissima, provida circumspectione stabilita:* QUOD OMNES TANGIT, AB OMNIBUS APPROBETUR.

Edward II. consulted with his PEOPLE in his first year *pro solemnitate sponsalium et coronationis*; and in his sixth year he consulted them, *super diversis negotiis statum regni et expeditionem* GUERRAE SCOTIAE *specialiter tangentibus**.

Edward III. summoned the peers and *Commons* in his first year to consult them, Whether they would resolve on peace or war with the Scottish king. In his sixth year, he assembled the lords and *Commons*, and required their advice, Whether he should undertake an expedition to the Holy Land. The lords and *Commons* consulted accordingly; and while they applauded his religious and princely forwardness to the holy enterprize, advised a delay of it for that season. In his thirteenth year, the parliament assembled *avisamento prælatorum, procerum, necnon* COMMUNITATIS to advise *de expeditione* GUERRAE *in partibus transmarinis*; and ordinances were made for provision of ships, arraying of men for the marches, and defence of the isle of Jersey. In his fortieth year, the Pope demanding the tribute of king John, the parliament assembled, where, after consultation apart, the prelates, lords and *Commons* advised the refusal of it, *although it be by the dint of the sword.*

Richard II. in the first year of his reign, advised with

* In his history of this prince, Mr. Hume has the following very strange assertion: "The Commons, though now an estate in parliament, were yet of so little consideration, *that their assent was never demanded.*" Vol. 2. p. 139.

be mentioned as a convincing proof, both of his genius and of his having studied the welfare of his peo-

the peers and *Commons*, How he should best resist his enemies? In the second year, he consulted his *people* how to withstand the Scots; who had combined against him with France. In the sixth year, he consulted the parliament about the defence of the borders; his possessions beyond sea, *Ireland* and *Gascoyne*, his subjects in *Portugal*, and safe keeping of the seas; and whether he should proceed by treaty or alliance, or the duke of Lancaster by force? The lord's approved the duke's intention for Portugal; and the *Commons* advised, that Thomas bishop of Norwich, having the Pope's *croiceris*, should invade France. In his fourteenth year, this prince advised with the Lords and *Commons* for the war with Scotland, and would not, without their counsels, conclude a final peace with France. And the year ensuing the *Commons* interested the king to use moderation in the law of provisions, and proposed that the duke of Aquitaine should be employed to negotiate the peace with France.

With regard to the power of the *Commons* as to *judicature*, in the times of which we speak, there are not wanting decisive proofs. In the reign of Edward II. the peers and *Commons* gave consent and judgment to the revocation and reversement of the sentence of banishment of the two Spencers*. In the first year of Edward III. when *Elizabeth* the widow of *Sir John de Burgo* complained in parliament, that Hugh Spencer the younger, Robert Baldock and William Cliffe his instruments, had by duress forced her to make a writing to the king, in consequence of which

*The share the *Commons* had in this act, Sir Robert Cotton authenticates from the parliament rolls: *Cottoni posthuma*, p. 348. Yet Mr. Hume, in the most positive terms, denies that the *Commons* had any concern in it. Vol. 2. p. 140.

ple, that, to the form into which he modelled the common law, as to the administration of common justice,

she was despoiled of her inheritance, sentence was given for her by the prelates, lords and *Commons*. In the 4th year of Edward III. it appears by a letter to the pope, that to the sentence given against the earl of Kent, the *Commons* were parties as well as the peers; for the king directed their proceedings in these words: *Comitibus, magnatibus, baronibus, et aliis de* COMMUNITATE *dicti regni ad parliamentum illud congregatis injunximus, ut super his discernerent et* JUDICARENT *quod rationi et justiciæ conveniret.* When in the first year of Richard II. William Weston and John Jennings were arraigned in parliament for surrendering certain forts to the king; the *Commons* were parties to the sentence against them, as appears from a writing annexed to the record. In the first year of Henry IV. although the *Commons* refer by protestation, the pronouncing the sentence of deposition against King Richard II. to the lords, yet they were equally interested in it, as is evident from the record; for there were made proctors or commissioners for the whole parliament, one bishop, one earl, one abbot, one baronet, and two knights. "And to infer, says a learned and accurate author*, that "because the lords pronounced the sentence, the point of "judgment should be only theirs, were as absurd as to "conclude that no authority was left in any other commis-"sioner of *oyer and terminer* than in the person of that man "solely that speaketh the sentence." In the second year of Henry V. the petition of the Commons imported no less than a RIGHT *to act and assent to all things in parliament*; and the king allowed that they possessed this right.

These examples of the importance of the people are striking; and they are supported by the authority of the parliament-rolls, or by records above exception. The curious reader may see them, and other proofs to the same purpose, in the posthumous pieces of Sir Robert Cotton.

* Sir Robert Cotton.

the wisdom of succeeding times has not been able to add any considerable improvements[28].

The crown of Edward I. but not his talents, descended to Edward II. The indolence, however, and the incapacity of the last prince, joined to his absurd passion for favorites, though they rendered his reign tumultuous and unhappy, were no less favorable to the dignity of parliament, and the power of the people, than the excellent administration of Edward III. and the necessities to which he was subjected by his ambition and his prowess. A weak prince may lose the prerogatives transmitted to him; but will never be the founder of a despotism. A high spirited monarch, dependent for resources on his people, may carry destruction and ruin into the country of an enemy, but will not easily be induced to attack the liberty and the prosperity of his own kingdom.

The sons of Edward III. had contributed, while he lived, to his grandeur, and that of the nation; but no sooner was he laid in his grave, than they excited

28. *Hale, hist. of the com. law*, c. 7. It has been sometimes insisted upon, that much improvement was brought to England by the canon and civil laws. I cannot, however, but imagine, that these laws have, on the whole, been rather attended with disadvantage. For tyrannical maxims do not suit a limited government. They may have assisted, indeed, the invention, and extended the views of some lawyers; but they have filled the heads of more with illiberal prejudices.

commotions. The ambition of their posterity was still more pestilent and fatal. The wars between the Houses of York and Lancaster deluged England with blood. The passions of men were driven into rage and phrenzy; and in the massacres, rather than the battles that ensued, conquest or death seemed the only alternative. But while we turn with sorrow from this bloody period of our story, our sympathy is softened by the recollection, that the contending princes brought accessions to liberty, by adding to the weight of the Commons. The favor and countenance of the people were anxiously solicited by both factions: and their influence failed not to grow, while the means of extending it were offered, and while they were courted to sieze them [29].

The nation, when satiated with the calamities of civil war, thought of uniting the claims of the two hostile families. Henry VII. the heir of the House of Lancaster, was married to Elizabeth, the heiress of the House of York. This prince, affected to be profound, and he has obtained that character. But the condition of Europe at the time in which he lived, and the situation in which he found himself,

29. The reader who is desirous of seeing proofs of the consideration of the people during the wars between the Houses of York and Lancaster, may consult Cotton's abridgment of the records; and Bacon on the laws and government of England. Part II.

pointed out to him his strain of conduct. He was more mysterious than wise; more prudent than enterprizing; and more a slave to avarice than ambition. Without having intended it, he placed the grandeur of the Commons on the most solid foundation. In the liberty which he granted to the nobility of breaking their entails, he saw only the degradation of that order. The civil wars had involved them in great expence; and the growing commerce and refinement of the times, exposed them to still greater. Their princely possessions flowed from them to give dignity to the people[30].

Henry VIII. had no certain character, and was actuated by no fixed and determined maxims. He had not the ability to form, nor the firmness to put into execution a deliberate scheme to overturn the liberties of his country. With less capacity than his

30. In the year 1546, there were 126 boroughs that returned members to parliament; and the greatest number of these were wealthy and populous. *Brown Willis, notit. parliam.* vol. 1. In the reign of Edward VI. 23 new boroughs were summoned to send burgesses to parliament. Philip and Mary added 13 more, Elizabeth 30, James the 2 universities and 12 boroughs, Cha. I. 8 boroughs, and Cha. II. the county of Durham and 2 boroughs. *Ellys on temporal liberty.* Anciently the king might incorporate any town, and enable it to send burgesses to parliament; but this privilege remains not at present with the crown. If the king was now to venture on the creation of a parliamentary borough, it would rest with the house of commons whether they would receive the members.

ancestor, his reign was more splendid; and, with a more imperious temper, he had the art or the felicity to preserve the affection of his subjects. The father removed the pillar which supported the power of the nobles: The son gave a mortal blow to the influence of the clergy. In the humiliation of both, the Commons found a matter of triumph. The Reformation, though it interrupted the progress of literature, was yet highly conducive to civil liberty. The church, in losing an authority which it had never merited, and which it had often abused, sunk into a dependence on government. The supremacy returned to the sovereign to whom it originally belonged, and with whom it ought constantly to have remained. The visitation of the monasteries discovered more than the inventions of a pious fraud; vices and abuses which cannot be described, without conveying to the mind the impression of whatever is most wicked and most dishonorable: Their suppression gave encouragement to industry and to the arts; and their wealth, diffused in a thousand channels, circulated through the kingdom.

The reformation advanced under Edward VI. but it was destined that this prince should only make his appearance on the stage of public life, and give the hope of an able administration. The sway of Mary was a paroxism of religious madness. She knew not, that when the individuals of a kingdom

have agreed to adopt a new religion, it is the duty of the sovereign to give a sanction to it. The reformed were about to experience whatever cruelty the extremity of a mistaken zeal can inflict. But the fires lighted by Gardiner, Bonner, and such abominable men, brought no converts to popery. The dread of endangering the succession of Elizabeth prevented the parliament from giving a check to the obstinate malignity and the sanguinary rage of this unworthy queen; or, perhaps, the nation had scarcely recovered the astonishment into which it was thrown by the atrocity of her deeds, when, in the sixth year of her reign, superstition, peevishness, and the most selfish and unhappy passions, put an end to her life.

Elizabeth, who had learned wisdom from misfortune, attained the summit of political glory. The perilous condition of affairs, on her commencing to reign, required singular moderation and ability, and she exerted them. A sagacity, almost incapable of mistake, directed all her operations[31]. England grew in commerce and advantages, while the rest of Europe was agitated with contentions, and debased with the tyranny of power. Her jealousy of prerog-

31. "As for her government, says a great authority, I "assure myself I shall not exceed, if I do affirm, that this "part of the island never had 45 years of better times; "and yet not all through the calmness of the season, but "through the wisdom of her regimen." *Lord Bacon.*

ative was corrected by her attachment to the felicity of her people; and the popularity with which she reigned is the fullest proof that she preserved inviolated all the barriers of liberty[32]. The reformation which the folly of her predecessor had interrupted, was completed by her prudence.

This accomplished princess was succeeded by James VI. of Scotland. He substituted, in the place of ability, the affectation of it. The English nation received him with marks of respect which they were

32. "She loved not to be tied, but would be knit unto "her people. Of 13 parliaments called during her reign, "not one became abortive by unkindness; and yet not any "one of them passed without subsidy granted by the peo- "ple, but one wherein none was desired. And sometimes "the aid was so liberal, that she refused the one half, and "thanked the people for the remnant; a courtesy that "rang loud abroad, to the shame of other princes. She "never altered, continued, repealed, nor explained any "law, otherwise than by act of parliament, whereof there "are multitudes of examples in the statutes of her reign." *Nat. Bacon, discourse on the laws and government of England, part* 2.

I do not mean to say that Elizabeth, and the princes who preceded her, never acted against the spirit of our government. Her reign, and those of many of her predecessors, were doubtless stained with bold exertions of authority. But bold exertions of authority must not be interpreted to infer despotism in our government. We must separate the personal qualities of princes, and the principles of the constitution. The government of England, and the administrations of its chief magistrates, are very different things.

not to continue long. With high notions of kingly dignity, all his actions tended to degrade it; and, while his littleness rendered him contemptible at home, he became an object of ridicule abroad, from his ignorance of foreign politics. Careless in the choice of his ministers, and supremely conceited of his own wisdom, his reign brought no glory to the crown.

The great improvement, which, about this period, displayed itself in the national manners, diffused among all ranks of men very enlarged ideas concerning the nature and principles of civil government. The arts had been cultivated with uncommon success. Discoveries had been made in the most distant regions of the globe. Commerce had brought great accessions of wealth. The balance of property had turned with no equivocal direction to the side of the people.

It was not an age for fastidious and tyrannical maxims. The Commons knew all their strength, and were determined to employ it. The prince endeavored in vain to impress them with his exorbitant notions of regal authority. Every complaint and grievance of the subject were inquired into; every suspicious and inclement act of prerogative was opposed. The doctrines of the divine right of kings, and of passive obedience, were now first heard of, and alarmed and astonished the nation. Pretensions to power, destructive of the natural and inherent privi-

leges of humanity, and inconsistent with every principle of common sense, were asserted from the pulpit, were claimed by the sovereign. The extravagance of James awakened the thunder which was to burst on the head of his successor.

Charles I. had imbibed the same lofty conceptions of kingly power; and his character was marked by the same incapacity for real business. His situation required insinuation and address; but he affected the utmost stateliness of demeanor. He disgusted the Commons; he insulted the people. To the exercise of his authority, he fancied there was no limitation. Inflamed with opposition, he presumed to attack whatever was most sacred, and most valuable among men. The imprudence of Buckingham had not softened his obstinacy: His queen was indiscreet, and he confided in her. The violent councils of Strafford precipitated his own and the ruin of his master. The religious foppery of Laud completed what the incapacity of James had begun: It was the cement of union between the friends of liberty and the sect of the puritans. The people beheld with a fixed and general indignation the insult and the violence which were offered to the majesty of their laws, and to their constitution. The flames of civil discord were kindled. England was torn during six years with political and religious fury. The unfortunate Charles atoned at length by his death the dis-

orders he had occasioned. The delegates of the people pronounced him guilty of misgovernment and breach of trust. "The pomp, says an eloquent his-" torian, the dignity, the ceremony of this transac-" tion, corresponded to the greatest conception that " is suggested in the whole annals of human kind[33]."

33. *Hume, Hist. of England*, vol. 5. p. 462. This historian, the most accomplished, perhaps, who has written in modern times, has attempted to vindicate both James and Charles; but he has done nothing more than to produce evidence to show, that in some respects they acted from precedents of administration in former princes; and this, if taken even in the fullest extent, is insufficient to justify them. Charles, however, it will be allowed, exceeded every violation of liberty, of which there had been any example; and when he had consented to reduce the exorbitancy of the regal power, his conduct created a suspicion of his sincerity. But on the supposition that he did not advance his authority beyond the practice of former times, he is not therefore to be vindicated. It is no exculpation of a crime in one individual, that it has been committed by others. The advantages of a free government belonged to the people of England; and they were the proper judges when to enforce their privileges against an invader. They might pardon in one sovereign what they would punish in another. They might overlook in Elizabeth what they did not wish to excuse in Charles. The doctrine of resistance is delicate. In a free constitution, like that of which we speak, the prince and the people will often fall into situations where they seem to encroach, or actually do so, on the rights of one another. But it is never on slight grounds that the people will be prevailed upon to take arms against their chief magistrate. After all, had England been an absolute monarchy, was it thence proper and just that it

Cromwel, the immediate cause of the death of Charles, and of those circumstances of censure which accompanied it, astonished at the height, to which, in the course of the civil wars, his ambition had carried him, was induced to aspire still higher. His genius was great, his fortune greater. On the abolition of monarchy, he introduced into England a military despotism, under the appellation of a common-wealth[34]. From an inferior rank, he had risen gradually to direct the affairs of a powerful nation. Though irregular in his politics, the vigour of his conduct brought signal glory to his councils and his arms. But the fabric he had built was ill-contrived and ill-cemented; its parts were disproportioned; and it rested on no solid foundation. It began to totter during his own life. His son Richard had none of the talents of an usurper. The minds of the people united in an anxious wish for the re-establishment of the ancient constitution; and general Monke acquired the honor of the peerage, and the fame of uncommon political sagacity, for forwarding an event which it was impossible to prevent.

should remain in that situation? There are rights which it is impossible that men can either lose or forfeit. No authority and no precedent, no usage and no law, can give a sanction to tyranny.

34. Lord Clarendon applies to him, with great propriety, what was said of Cinna, *eorum eum, quæ nemo auderet bonus; perficere, quæ a nullo, nisi fortissimo, perfici possent.*

Charles II. never forgave the people of England for the misfortunes he himself had suffered, nor for those of his House. This monarch had quickness of parts, but possessed not that discernment which sees into the future. He entered without reflection into schemes and projects, and renounced them with the same precipitation. Though an enemy to the constitution of his country, and though in the interest of France, he was not able to produce any lasting disadvantage to the kingdom. His reign, though tumultuous, was not unfavourable to liberty. The total abolition of the military tenures and their appendages, which had place during his sovereignty, was a most important acquisition to the people: It relieved their estates from every source of legal oppression. The *habeas corpus* act, which was some years posterior to it, offered the firmest security to their persons. It produces in a court of justice the body of every prisoner; it makes known the cause of every commitment; and if an individual has suffered confinement in opposition to the law, though at the command of the king in council, he is restored to his liberty, and has a claim of compensation for the loss and the indignity his affairs and his honor have sustained.

The clamour against popery was loud and violent during the long administration of Charles II. and yet the crown was permitted to pass to the Duke

of York. This confidence, so honorable to the people, was abused by the sovereign. James II. had the zeal of a monk, not the virtue and talents of a great king. His bigotry and his lust of power made him perpetrate the most atrocious and the most insolent acts. Violating equally civil and religious liberty, his subjects deprived him of a throne of which he was unworthy.

In settling the crown on the prince and princess of Orange, the wisest precautions were taken, that the religion, the laws, and the liberties of England should never more be in danger of being subverted. The limits of the prerogative were defined; the extent of the freedom of the people was ascertained; and the doctrine of resisting the prince, when he should presume to encroach on the rights of the subject, was explained and illustrated[35].

From the Saxon conquest, during a long succession of ages, this fortunate island has never degenerated from liberty. In the most inclement periods of its history, it despaired not of independence. It has constantly fostered that indignant spirit which disdains all subjection to an arbitrary sway. The constitution, prospering under the shocks it received, fixed itself at the highest point of liberty that is compatible with government. May it continue its pu-

35. Bill of rights, toleration act, act of settlement.

rity and vigor! and give felicity and greatness to the most distant times!

March, 1775.

LECTURES

ON THE

LAWS OF ENGLAND.

LECTURE I.

The intention and purposes of political society....Customs and manners govern men before the enactment of positive Laws ....Arts and property the sources of legislation....Peculiarities attending the institutions of Lycurgus and those of Moses....In the infancy of a state, laws are few and plain ....In times of civility and refinement, they are numerous and complicated....The liberty of the people a great cause of the multiplicity of laws....The difficulty of the study of the English law....The methods which have been followed in the study of it.

SINCE every political society was originally framed for the general benefit of the several individuals of which it was composed, in order that, supported by the united strength of the whole community, each person might have that security in his life, his liberty, his property, which, unassisted in a state of nature, he could not of himself attain unto; and that, instructed by the joint counsels and wisdom of the whole body, he might so direct his actions, as to pro-

mote the public welfare, with which his own safety and interest are necessarily connected; it follows, that in such a state, every man must, even for his own sake, in many things, sacrifice his private judgment, and his natural liberty of action, to the will of that community to which he belongs; which will, acting uniformly for the same purposes, cannot fail of producing a number of fixed rules and regulations, to serve as directions to the subjects, in such cases as are common, and frequently occur.

Accordingly, we find, there never was a state or nation, even but one degree removed from barbarity, that subsisted without some general customs, at least, which supplied the place of positive laws, by which the conduct of the several members of the society was to be governed, and for the breach of which they were liable to punishment; and in such a submission the very essence of political freedom consists. For, as M. Montesquieu very justly observes, the liberty of man in a social state, different from that in a state of nature, consisteth not in a power of acting, in all things, according to his own judgment, but in acting according thereto, in subservience to the will of the public, in being free to do all things the law prohibits not, and to omit all things the law doth not enjoin*.

Hence, in all such infant states, the greatest respect is paid, and the highest influence allowed to those who, either by their age and experience, or, by their application and labor, have arrived at a proficiency in the knowledge of the customs and prac-

*L'Esprit des Loix, Liv. xi. ch. 3.

tices prevailing in their own and neighboring nations: *Qui mores hominum multorum vidit et urbes*, is the great eulogium of the most accomplished hero of the heroic ages.

It must be allowed, indeed, that in societies so small that their members are, in general, contented with little more than the bare necessaries of nature, a few rules will be sufficient; and every man of a tolerable capacity will, with a reasonable degree of observation, be, in some measure, qualified to be his own lawyer. But when it shall happen that arts are not only introduced, but become common among any people, when the comforts and conveniencies of life are, in the public opinion, esteemed necessaries; when the industry of some, and the negligence of others, have produced a remarkable inequality in the goods of fortune; when riches hath brought forth her offspring, insolence and oppression, and when envy and avarice inflame the breasts of the indigent, it will be absolutely necessary to lay a continual restraint on such violent passions, ready at every instant to destroy the peace of society, and to tear it into pieces, and for that purpose, to form a great number of regulations, to curb those who have created to themselves imaginary wants, and who no longer regulate their conduct by the plain dictates of rude and simple nature. And as the condition of such a nation must be perpetually changing, as new arts and gratifications will be continually invented, as the increase of commerce will every day open a prospect of more various acquisitions, and insensibly introduce a general change of manners in the people; and, above all, as the wits of men, checked in

their darling pursuits, will ever be at work to discover methods of eluding those laws which they dare not openly infringe, there must ensue a constant alteration and variation of the rules already in being, and a continual addition of new ones to answer new and unforeseen emergencies. The laws, therefore, of a nation so circumstanced, must increase to such a number, and consist of so great a variety of particulars, as to render it impossible for the generality of the subjects to be masters of them, and will oblige them to resort to those whose easy circumstances and leisure have enabled them thoroughly to comprehend and understand them; and among such a people their must be *lawyers*, although, perhaps, not formed into a distinct and separate profession, or known by that appellation.

Great, undoubtedly are the inconveniencies which attend a multiplicity of laws, and very hard it seems, that all men should be obliged to obey a rule, which it is confessed the majority are incapable of perfectly knowing; but such is the natural and necessary course of things. If men will not be contented to live in a state next to absolute barbarity, if they will enjoy the conveniencies as well as the necessaries of life, if they will be secured against the oppression and fraud of their fellow subjects, as well as against the violence of strangers, they must submit to and abide by the consequences. And so sensible of this necessity was the great Spartan legislator, that when he resolved his state should admit of no addition to, or alteration of his regulations, he wisely stopped up the sources from which new laws spring. Commerce, and its instrument, money, were prohibited; all arts,

except those absolutely necessary, were interdicted, and the people, by constantly living and eating in public, were not only accustomed, but necessitated to content themselves with what simple nature requires. By these means (and by these only, or by others similar to these, could it be accomplished) Lycurgus gave a firmness and stability to his republic, which continued for several hundred years, until conquest introduced wealth, and its necessary attendants, which soon eat out the vitals of that singular constitution*.

The law of Moses, likewise, was invariable, and admitted of no additions or alterations; and as, from the peculiar circumstances of the country, and its situation, there was no danger of an accumulation of wealth from foreign commerce, so were the domestic regulations inimitably calculated to prevent a great inequality of circumstances, and to oblige the nation in general to a plain and simple life. All usury among the Israelites was prohibited, the lands were alienable no longer than to the year of jubilee, at which time they returned free to the original proprietor or his heirs; and by the invariable rules of descent, and the continual dividing of estates among all the males in equal degree, every man was proprietor of some small patrimony, and consequently obliged to live in a frugal and laborious manner†. Athens, on the contrary, the most commercial and the richest city of Greece, abounded, above all others, in a multiplicity of laws, and those, for the causes already

*Plut. Vit. Lycurg.

†Spencer, Dissert. de ratione Leg. Usuram prohibentis

mentioned, perpetually varying and changing. Rome, while it continued a mere military state, was contented with a few, and those such as were short and plain; but when, by the conquest of Carthage, of Greece, and of Asia, floods of wealth were poured into Italy, the necessary consequences soon followed. New laws were continually made, which, being as continually eluded, of course gave birth to others.... Every new conquest brought an accession of riches, and became a source of farther regulations: until at length, they swelled to such a magnitude, as to become, in the time of Justinian, an intolerable burthen: For, to say nothing of the laws themselves, the *senatus consulta*, the *plebiscita*, the *edictum perpetuum*, and the constitutions of the emperors, which were very voluminous, the bare commentaries of the lawyers of authority, amounted to three thousand volumes.

If we look around the nations that now inhabit Europe, we shall find that the same causes have constantly, every where, produced the same effect. How few, how short, how plain, and simple, were the ancient laws of the Saxons, the Franks, the Burgundians, the Goths, and the Lombards, while each of them continued a plain and simple people*... As they increased in arts and wealth, as their kingdoms grew more powerful, either from internal peace and commerce, or by the melting of different sovereignties into one, we might see the laws gradually increase in number and in length; this arose from the necessity their legislators were under, from the

* Lindenbrogius, codex legum antiquarum.

different circumstances of the times and people, to enter into details of which their ruder ancestors had no conception: and this augmentation hath ever been in proportion to the wealth and power of the people that was obliged to admit it; as might easily appear by fixing on any one period, and by comparing the laws of those nations where arts and trade were fully established, with those of others where they had not yet got so firm a footing.

Within these last two hundred and fifty years, the inhabitants of Europe in general, particularly those that have any considerable share in universal commerce, seem to have been seized with an epidemical madness of making new laws; insomuch that there is scarce a state whose laws, since the year 1500, are not equal if not superior, in number and bulk, to those made in many preceding ages; an effect owing partly to the decay of the old military system, and to the necessity every government was under, to have recourse to new methods for its support, when that failed; but principally to the discoveries of America, and of the passage to the East-Indies; which, by the peaceful arts of industry and trade, have poured into modern Europe an accession of treasure, equal to what was amassed in Italy by conquest and rapine under the Roman empire. As Britain during this interval, shared more largely than any other country in this vast increase of wealth, it is not surprising that her later laws have been numerous and voluminous in proportion.

But there is another cause peculiar to these nations, which hath not a litttle contributed to the same end, namely, that happy constitution, and that liber-

ty in which we so justly glory. A constitution which lodges the supreme, the legislative power in three different hands, each of which (if considered apart) hath an interest separate and distinct from the other two, must require a variety of wise regulations, so to ascertain their respective rights and privileges, and so to poise and balance them, as to put it out of the power of any one to overtop the others. A constitution that admits the people, by representation, to so considerable a share of power, must have many laws to determine the manner of elections, and the qualifications both of electors and elected. A constitution that makes the preservation of political freedom its great object, and that aims to defend the life, liberty, and property of the meanest indivdual, not only against others of their own rank, but even against the executive power of the society itself, must have many extraordinary fences, and barriers, to protect the weak from the mighty. Such a constitution must, more particularly than others, restrain its judges, the dispensers of justice, who are, at the appointment of the crown, to follow the strict letter of the positive laws; lest, under the pretence of explaining and extending them, the most valuable privileges of the people might be betrayed, or rendered illusory.... And this very restraint, so necessary in such a form of government, will eternally (as new cases arise, which, not being in the contemplation of the legislature at the time, were not comprehended in the words of the old provisions) occasion the framing of new ones.

The state and condition of these kingdoms are such, therefore, as necessarily require a greater num-

ber of laws; and heavy as the burthen of them may seem, it should be borne with cheerfulness, by all who esteem the conveniencies of life, and the perfection of arts, more than a rude and simple state of nature; who think wealth more eligible than poverty, and power than weakness; or lastly, who prefer our excellent form of government, and its mild administration, to the despotic tyrannies of Asia, or the more moderately absolute monarchies of Europe.

From what hath been already observed, the difficulties attending this study in these kingdoms will readily appear; but these, instead of discouraging, should animate every gentleman, and inspire him with resolution to surmount them; when he considers them as inseparable from the happy situation in which we are placed, and that the character of an upright and skilful lawyer is one of the most glorious, because one of the most useful to mankind; that he is a support and defence of the weak, the protector of the injured, the guardian of the lives and properties of his fellow citizens, the vindicator of public wrongs, the common servant both of prince and people, and in these countries, the faithful guardian of those liberties in which we pride ourselves, and which the bounteous Creator bestowed originally on all the sons of Adam, and would have continued to them, had they continued worthy of the blessing.

From hence, likewise, abundantly appears the necessity of proper methods being pointed out for the study of the laws, and of proper assistance being given to the youth intended for this profession. This was always allowed, and for this purpose were the inns of court originally founded; and it must be owned, that

in ancient times, they, in a great measure, answered the end. Their exercises, in those days, were not mere matters of form, but real tests of the student's proficiency. Their readers laid down, in their lectures, the principles of particular parts of the law, explained the difficulties, and reconciled the seeming contradictions; though, at the same time, it must be owned, too many of them exerted themselves in displaying their own skill and depth of knowledge in the profession, rather than in removing the obstructions, and smoothing the ruggedness which are so apt to discourage beginners, and which all beginners must meet in this untrodden path, without a guide. But, since the time that these aids have been there laid aside, and that, in the midst of so great and so rich a city, any degree of restraint or academical discipline, to keep the students constantly attentive to the business they are engaged in, hath been found impracticable, it has been the wish of every considering person, that the elements of this science should be taught in some more eligible place, where the students may at once have the benefit of a proper method of instruction, and by proper regulations be obliged to improve themselves in a study so important both to them and the public.

That the universities, the seats of all other branches of learning, are the places most fit for this purpose, hath been so fully proved by Mr. Blackstone, in his preliminary lecture, not long since reprinted in this kingdom, that it will be much more proper and decent for me to refer gentlemen to that excellent performance, than to weaken his arguments, by repeating, in other words, what he has demonstrated, with

such force of reason, and such elegance of expression. I shall only add to what he hath observed, that every other nation of Europe hath admitted the profession of their municipal laws into their universities, and that the same hath been the opinion and practice of almost every age and country, as far back as the lights of history extend. Were not the laws of Egypt, as well as their religion, physick, history, and sciences, taught in the colleges of their priests? It is allowed by all, that the principal employment in the schools of the prophets was the study of the law of Moses; and, to come to more modern times, the very first universities that were ever founded by royal authority, were the works of Roman Emperors, and erected merely for this profession. The famous academies of Rome for the west, and of Berytus for the east, furnished that extensive empire with a constant succession of excellent lawyers, whose names, and the fragments of whose works were held in the highest honour, until the inundation of barbarians from the north of Europe, and the prevailing arms of the Saracens in the east, extinguished the Roman government in those parts. But that of Constantinople, founded soon after the translation of the seat of empire thither, had a more happy destiny, flourished with distinguished reputation to these later ages, and perished not, but with the empire itself, when that city was taken by the Turks. Nay, so sensible were the Arabs themselves, who destroyed the Roman academy of Berytus, of the utility of such institutions, that for their own law, they erected others of the same nature in Bagdad*.

* Conringius de Antiquitatibus Academicis. Bruckerus,

Another powerful reason for laying the foundation of this branch of learning in these seats of literature, arises from the great utility, or rather, indeed, necessity, that all gentlemen bred in them are under, of gaining a general idea, at least, of the principles and practice of the law of their country. How advantageous this would be to every rank of gentlemen, whether legislators, magistrates, divines, or jurymen; and to all, in short, who have any property to preserve, or transmit, or who have wishes or desires to acquire any, may be seen at large, illustrated by Mr. Blackstone in the same performance. And indeed, if, before the attempt, there could be any doubts of the propriety of beginning this study in an university, the extraordinary success of his lectures in Oxford, and the high reputation he hath so justly acquired thereby, leave no room for entertaining such at present. For though much of both must be attributed to the singular abilities of that gentleman, yet it must be allowed that the most skilful gardener cannot make a tree flourish in a soil unnatural to its growth. With the deepest gratitude, therefore, should the members of this university acknowledge the munificence, and the wisdom of our present most gracious sovereign, who established the present foundation for the benefit of the youth of this kingdom.

But if the importance of this institution to the public be considered, together with the difficulties attending the just execution of it, when these difficulties are enhanced by the novelty of the attempt, when the

Hist. Philos. Giannone's hist. of Naples, lib. 1. chap. 10. § 1. and 11. lib. 11. chap. 6. § 1.

public attention is engaged by that very novelty, and when the future success of the foundation, may perhaps, in some measure, depend on the opinion conceived of it at the beginning; he must, indeed, be possessed of a very overweaning opinion of his own abilities, who can undertake so arduous a task, without feeling strong apprehensions at the first setting out. All the return the person thought worthy by this learned body to fill this chair can make them for so high an honour, and so important a trust, is to assure them, that the utmost care, and the greatest exertion of what knowledge and abilities he possesseth, shall be employed to answer the ends proposed, and to justify, as far as in him lies, the choice they have made. And if the young gentlemen, for whose benefit these lectures are designed, possessed with a just notion of the great utility to themselves, and their country, of the study they are engaged in, will exert that industry, for the honor of their mother university, which hath made her so long famous for other branches of learning; he doubteth not but his weak endeavors at the first essay, will not only merit indulgence, but in the end be crowned with some considerable success. On their assiduity, as well as upon his skill, must the success of the undertaking depend.

In the next lecture the grounds and reasons of the plan proposed as most proper for the commencing this study in this university, shall be laid open, in hopes that the students will proceed with the more alacrity, if they can be once convinced they are set in the right track, and that, by the professor's laying before the public the inducements he had to prefer

this before any other, he may acquire information from the skilful of its errors and imperfections, and, consequently, alter it, so as most effectually to answer the useful ends of the institution.

LECTURE II.

The plan of the present undertaking....The particulars in which it differs from that adopted by Mr. Blackstone....The different situations of the Universities of Oxford and Dublin....The chief obstructions which occur to the student of the English laws....The methods which may be employed to remove them....The law of things, *more proper to introduce a system of jurisprudence than the law of* persons.... *The law of* things, *or of real property in England, has its source in the feudal customs....The necessity of a general acquaintance with the principles of the feudal polity....The method in which it is proposed to treat of it.*

HAVING, in the preceding lecture, shewn the necessity of a proper method being pointed out for the study of the laws of these kingdoms, from the utility, as well as the multiplicity of them; and having explained from whence that multiplicity arises, and that it is inseparable from the happy situation we are placed in; and having acknowledged the great advantage the students of Oxford have received from Mr. Blackstone's lectures, it will doubtless be thought necessary, that something should be said by way of illustration of the plan proposed to be followed here, and in justification of its departure from the excellent one which that gentleman has given us in his analysis. The method of instruction intended to be pursued in this place, is not proposed as more perfect, or absolutely better in itself, but as one that appears more adapted to the circumstances of our students; and

as it will be allowed, that his course of lectures, in the manner they proceed, hath some great advantages as to the finishing a lawyer, which cannot be attained, and therefore should not be attempted here, it will be particularly the duty of your professor to compensate for those, by guarding against some inconveniencies, which the extensiveness of his plan must of necessity subject young beginners to. I shall, therefore, proceed briefly to compare the situation of the two universities, in hopes, by that consideration, in some measure to vindicate the several particulars wherein I have chosen to vary from his scheme. The attendance on the courts of Westminster-Hall, when once a gentleman hath read and digested enough to listen with understanding to what he there hears, hath, for a succession of ages, been allowed to be, and it must be owned is, the most effectual means of accomplishing a lawyer, and fitting him for practice. In this respect, Oxford, in her proximity to Westminster, hath certainly an advantage, as to her law students above two years standing, who may at that time be supposed capable of improvement by the arguments in the courts of law; as she is thereby rendered capable of conjoining those two excellent methods of instruction. Mr. Blackstone was fully sensible of this happy circumstance, and, accordingly, his scheme was adapted to it. All the lectures there are appointed at times that fall in the law vacations, and the course is general and diffusive, not calculated merely for attendants of the first and second years, but adapted also to those of a more advanced standing, and consequently, in a manner equally copious, or very nearly so, illustrates every one of the several branches of the

English law. But this method, however excellent in itself, and most eligible where gentlemen can have an opportunity of attending the professor for several successive years, must on the other hand, be allowed to labour under some inconveniencies, especially as to those who are yet novices, which, as it should be the particular care of the professor here to obviate, it cannot be improper briefly to point out.

As the lectures of the English professor are all read in the law vacations, and in all of them, except the long one, when few young gentlemen of fortune stay in the universities, the shortness of these vacations necessarily occasions these lectures to follow each other in a very quick succession; and accordingly we find that five are delivered in every week. It is impossible therefore, that the students at first should keep any manner of pace with their professor in their private reading, without which the ablest performances in the way of prelections will be of little utility. Many things in the succeeding ones must be rendered very difficult, if not absolutely unintelligible, for want of a due time for mastering and digesting those that preceded; and another unhappy consequence of this quick succession is, that the most useful and effectual method of instruction to beginners, at their entrance upon any science, namely, a continued examination of the progress they have made, is hereby entirely precluded, and rendered impracticable. The great advantage of that method need not be enlarged upon in this place, as every gentleman who hears me must be already fully satisfied of it from his own experience.

But this university is circumstanced in a very differ-

ent manner. The necessity our students are under of repairing to Westminster, to finish their studies, before they are called to the bar, and their incapacity to reap any benefit from the courts of law while they reside here, render it impossible, as well as unnecessary, to conjoin those two methods of instruction before mentioned, as is done at Oxford; and, by confining the professor to pupils of two years standing, or little more, make it highly improper for him to enter minutely into those parts of the law his audience have not yet had time to apply to. His great object, therefore, should be so to frame his lectures, as to be most useful to youth at the beginning, to be particular and copious in the elementary parts, in order to lay a sure foundation, and to smooth and make plain the difficulties which at first will every where occur. And as, for these reasons, a general and equally diffusive course is a method improper for him to pursue, it should be his especial care to avoid, or remedy the inconveniencies with which such an one is necessarily attended.

It is a well known truth, that the entrance on any study, however easy and agreeable such study might be after some progress made in it, is at the beginning very irksome, and attended with many perplexities; principally arising from the use of new terms, whose significations are yet unknown. But the laws of all nations, and those of England above all others, abound in such novel words, and old ones used in an uncommon sense, more than any other science, and therefore, must be attended with difficulties in proportion. And although many of its terms occur frequently in common conversation, and may, consequently, be supposed already understood, this is rath-

er a disadvantage than otherwise; for in common discourse they are used in so vague and undetermined a meaning, and so far from strict precision and propriety, that it is no wonder so many persons exclaim at the absurdity of its maxims; which, though frequently in their mouths, they do not really understand. Young gentlemen, then, have not only many new words to acquire the signification of, but they must likewise unlearn the import of many others they are already acquainted with, and affix to those familiar terms new and precise ideas, a task, as Mr. Locke observes, of no small difficulty, and that requires not only the strictest attention, but constant care and frequent repetition. Another great difficulty the study of the law of England labours under, peculiar to itself, is that want of method so obvious to be observed, and so often complained of in its writers of authority, insomuch, that almost all of them, and lord Coke particularly, are too apt to puzzle and bewilder young beginners; whereas other laws, the civil, the canon, the feudal, have books of approved authority, (and none other but such should be put into the student's hands) calculated purposely for the instruction of novices; wherein the general outlines of the whole law are laid down, the several parts of it properly distributed, its terms explained, and the most common of its rules and maxims, with the reasons of them, delivered and inculcated. It is not to be admired then that Sir Henry Spelman so pathetically describes his distress at his first entrance upon this study. *Emisit me mater Londinum, juris nostri capessendi gratia, cujus cum vestibulum salutassem, reperissemque linguam peregrinam, dia-*

lectum barbaram, methodum inconcinnam, molem non ingentem solum, sed perpetuis humeris sustinendam, excidit mihi fateor animus.*

These then are the obstructions to be removed, and the difficulties to be obviated, by a professor who considers it his business to lead by the hand young gentlemen, yet strangers to the study; and for this purpose he should exert his utmost care and attention, not to overburthen the memories, or to distract the attention of his audience with too great variety at first, but to feed them with knowledge as he finds them capable, and to give them time, by reading and meditation, to become masters of what they have already acquired, and by frequent examinations to satisfy himself they thoroughly comprehend and retain the substance of his past lectures. The utility of this last method, by which the students will be laid under a necessity of reading in private, as to them, will be readily allowed; but taken in another view, will be of no less assistance to the professor himself, in framing the prelections he is to read. He will not only be encouraged to proceed with more alacrity when he daily observes the success of his endeavors, but also, by the trial, be convinced of any defects or errors in his plan that before escaped his observation, and will be warned thereby to amend them; and he will by this means, be particularly and perpetually cautioned against the great and too common mistake of tutors, namely, their imagining that such explications as are easy and familiar to them, will be equally obvious to unexperienced youth. But an examination will demonstrably shew him where his illustra-

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tions have been defective or obscure, and will oblige him to accommodate his lectures to the capacity and progress of his hearers. The next variation in the present plan from that of Mr. Blackstone, to be taken notice of, is the proposal of beginning with the law of *things*, not with the law of *persons*, as he hath done. It must be allowed impossible thoroughly to understand the law of things, without some previous knowledge of that of persons; but it is equally impossible to be master of the law of persons, without an acquaintance with that of things. Since, therefore, we must begin with one of them, perhaps it will be sufficient to observe, that such knowledge of the names and relations of persons, as is generally acquired by observation, before a person arrives at an age fit for engaging in this study, will enable him tolerably to understand the law of things; and that whatever more is necessary, and hath not been attained by this means, may be easily supplied as the student goes on. And, that I may not be thought to lean too much on my own opinion in this particular, I shall quote the famous Sir Matthew Hale to the same purpose; who, in his analysis, introduces the law of things in the following manner: "Having "done with the rights of persons, I now come to the "rights of things; and, though, according to the usual "method of civilians, and of our ancient common "law tractates, this comes in the second place, and "after the *jura personarum*, and therefore I have "herein pursued the same course; yet that must not "be the method of a youg student of the common "law, but he must begin his study here, at the *jura* "*rerum;* for the former part contains matter proper

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Taking it then for granted at present, that the law of real property is the fittest introduction, it will be necessary, as it is confessed to be the most important, the most extensive, and, in consequence, the most difficult part, to lay the foundation deep and sure, and to derive its rules from what is now universally allowed to be its source, the feudal customs. This, indeed, hath been denied by Lord Coke, and others of his age; who thought it would depreciate the excellence of the laws of their country, to admit they were derived from any other nation. But if those gentlemen had read over but once the two books of the feudal law with tolerable attention, they must have received conviction, that one of the laws was certainly derived from the other; and which of them was so, would easily appear, by comparing the law of England after the conquest, with that which prevailed in the Saxon times, and was not strictly feudal, exclusive of the testimony of the old historians.

But, perhaps, for this purpose, it may be thought sufficient to explain and deduce these rules from the feudal ones, as they occur occasionally in the books of the common law; which is the method, that, in conformity to the rest of his plan, the Oxford profes-

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and the great help to the memory, by acquiring a perfect knowledge of the true grounds of those various rules, and of their mutual connection with and dependence on each other. *Ignoratis causis rerum, ut res ipsas ignoretis, necesse est*, is a maxim frequently in our lawyers mouths; and Littleton and Coke continually exhort the student to explore the grounds and reasons of the law, as the only safe foundations to build on, and deny that any man, without being perfectly acquainted with them, can merit the honorable appellation of a lawyer.

But there is another, and, for gentlemen of rank and fortune particularly, a more important consideration, that renders a general acquaintance with the principles of the feudal law very proper at all times, but at present eminently so; namely, the necessity of knowing these, for the understanding the nature of those Gothic forms of government, which, until these last three hundred years, prevailed universally through Europe, and whence the present constitution, with several corrections and improvements indeed, in which these islands are now so happy, is undoubtedly derived. From hence only shall we be able to determine whether the monarchy of England, as is pretended, was originally and rightfully an absolute royalty, controuled and checked by the virtue of the prince alone, and whether the privileges of the subjects, which we are so proud of, were usurpations on the royal authority, the fruits of prosperous rebellion, or at best, the concessions of gracious princes to a dutiful people, and revocable by them or their successors, whenever, in their opinion, their vassals should become undeserving; principles that were

industriously, and, to the misfortune of a deluded royal family, too successfully propagated during the last century, and that, of late, have been revived and defended, with no less zeal, than seeming plausibility. Every man, indeed, of candour and humanity, will look with tenderness on the errors of princes, unhappily educated in mistaken notions, and make due allowances for the weight which arguments urged with great apparent force of reason, concurring with the lust of power, so natural to the human breast, will certainly have on such minds; but, surely, this indulgence may be carried too far, and will be allowed so to be, if, for their justification, it shall appear upon examination, that the history of past ages has been partially delivered down, and perverted; and that to the vain and unprofitable grandeur of the prince, the happiness of millions, and their posterity, hath been attempted to be offered up in sacrifice. The question is of a matter of fact; for on the decision of the fact, how the constitution of England anciently stood, the question of the right solely depends. And surely it is the duty of every gentleman to inform himself, on the best grounds, whether those great men, who, for a succession of ages, exposed their lives in the field, or exerted their eloquence and wisdom in the senate, for the purpose of preserving, and perpetuating these privileges, deserved the honorable name of patriots, or the detestable appellation of rebels; whether the grievances our glorious deliverer came to redress were real or imaginary; or, if real, were such as our fathers were in conscience bound to submit to; and whether we can with justice give to the family that now fills our

throne with such lustre and dignity, that title which they have always esteemed as their highest honor, of being the lords of freemen, and the assertors of the liberties of mankind.

As the book* which it is intended the young gentlemen shall read for the purpose of acquiring a general idea of the feudal law, is composed in a systematical method, it is proposed that these lectures shall proceed in an historical one, in order to shew the original reasons of those customs, and to point out from what small beginnings, and by what particular steps and gradations the mighty fabric rose. By this means the additions to, and the alterations of the law will be seen in a clearer light, when we are acquainted with the nature of the regulations already in being; and by knowing the circumstances of the times, can at once perceive the wisdom and necessity of such additions and alterations. And it is hard to imagine a study more improving, more agreeable, or better adapted to a liberal mind, than to learn how, from a mere military system, formed and created by the necessities of a barbarous people, for the preservation of their conquests, a more extensive and generous model of government, better adapted to the natural liberties of mankind, took place; how, by degrees, as the danger from the vanquished subsided, the feudal policy opened her arms, and gradually received the most eminent of the conquered nation to make one people with their conquerors; how arts and commerce, at first contemptible to a fierce and savage people, in time gained credit to their professors, and an admittance for them into the privileges of the soci-

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ety ; and how, at length, with respect to the lowest class of people, which still continued in servitude, its rigour insensibly abated ; until, in the end, the chains of vassalage fell off of themselves, and left the meanest individual, in point of security, on an equal footing with the greatest.

Thus much has been thought necessary to observe, in order to shew the reasons of proposing a course of the feudal laws, as an introduction to the English ; to which may be added, that this method hath received the approbation of many good judges, and hath, in experience, been found not only useful for the end proposed, as it is the constant practice in Scotland, whose laws, except in the manner of administering justice, differ little from ours, and hath been also used in England with good success ; but, at the same time entertaining and improving in other respects.

As we are to begin, therefore, with this law, the observations on the remaining parts of the plan may be, for the present, deferred ; I shall, in my next lecture, begin to deduce the origin of this law, and of its rules, from the customs of the German nations, before they invaded the Roman empire.

LECTURE III.

An enumeration and confutation of several opinions concerning the foundation of the feudal customs....The origin and rules of the feudal law to be deduced from the institution of the German nations before they invaded the Roman Empire....The English indebted for this law to the Franks.... A general description of this people, with an account of the several orders of men into which they were divided while they continued in Germany.

THE feudal customs succeeded the Roman imperial law in almost every country in Europe, and became a kind of *jus gentium;* but having sprung up in rude illiterate ages, and grown by slow degrees to a state of maturity, it is no wonder that very different have been the opinions concerning their origin, and that many nations have contended for the honor of giving them birth, and of having communicated them to others. Several eminent civilians, smit with the beauty of the Roman law, and filled with magnificent ideas of the greatness of that empire, have imagined that nothing noble, beautiful, or wise, in the science of legislation, could flow from any other source; and, accordingly, have fixed on Rome as the parent of the feudal constitutions. But as the paths of error are many, and disagreeing, so have their endeavors to make out, and defend this opinion, been various in proportion; a short mention of them, and a very few observations, will be sufficient to convince us that they have been all mistaken.

First, then, some civil lawyers have discovered a likeness between the Roman patrons and clients, an institution as early as Romulus himself, and the feudal lords and vassals*. The clients, we are told, paid the highest deference and respect to their patrons, assisted them with their votes and interest; and, if reduced to indigence, supplied their necessities by contributions among themselves, and portioned off their daughters. On the other hand, the patrons were standing advocates for their clients, and obliged to defend, in the courts of law, their lives and fortunes. The like respect was paid by vassals to their lords, and similar assistance was given to their wants. The fortune of the first daughter, at least, was always paid by them, and if they were impleaded, they called in their lords to warrant and defend their lands and other property. Thus far, we must confess, there is a strong resemblance; but the differences are no less material, and shew plainly that one could not proceed from the other. The connection between the patron and the client was merely civil; whereas the relation between the lord and the proper vassal was entirely military; and his fealty to his superior was confirmed by the sanction of an oath, whereas there was no such tie between patron and client. The aids which the tenant gave to his lord's necessities, except in three instances, established by custom, to redeem his lord's body taken in war, to make his eldest son a knight, and for the first marriage of his eldest daughter, were purely voluntary. But the great point which

* See Craig, de Feud. lib. 1. dieg. 5. and Selden's Titles of Honour, part second, chap. 1. § 23. Basnage, Coutume reformée de Normandie, tom. 1. p. 139.

distinguishes them was, that whereas the Roman client's estate was his absolute property, and in his own disposal, the feudal vassal had but a qualified interest. He could not bequeath, he could not alien, without his lord's consent. The *dominium verum* remained with the lord to whom the land originally had belonged, and from whom it moved to the tenant. Upon the failure therefore of the tenant's life, if it was not granted transmissible to heirs, or if it was, on the failure of heirs to the lands, it reverted to the original proprietor. Neither was the lord, on all occasions, and in every cause, bound to be his vassal's advocate, or, as they express it, *bound to warranty*, and obliged to come in and defend his tenant's right and property. For the fealty on one side, and the protection on the other, extended no farther than the feudal contract; and therefore the one was not bound to warrant any of the tenant's lands, but such as were holden of him, nor the other to give aid, or do service in regard of his whole property, but in proportion to that only which he derived from his superior. Add to this, that the lord, in consideration of the lands having been originally his, retained a jurisdiction over all his tenants dwelling thereon, and in his court sat in judgment and determined their controversies. These striking diversities (and many more there are) it is apprehended, will be sufficient to demonstrate the impossibility of deriving the feudal customs from the *old* institution of patron and client among the Romans.

Secondly, Others, sensible that military service was the first spring, and the grand consideration of all feudal donations, have surmised, that the grants

of forfeited lands by the dictators Sylla and Cæsar, and afterwards by the triumvirs Octavius, Anthony, and Lepidus, to their veterans, gave the first rise to them†. In answer to this, I observe, that those lands, when once given, were of the nature of all other Roman estates, and as different from fiefs, as the estates of clients, which we have already spoken of, were.... Besides, these were given as a reward for past services, to soldiers worn out with toil, and unfit for farther warfare; whereas fiefs were given at first gratuitously, and to vigorous warriors, to enable them to do future military service.

Others have looked upon the emperor Alexander Severus * as the first introducer of these tenures, because he had distributed lands on the borders of the empire, which he had recovered from the Barbarians, among his soldiers, on the condition of their defending them from the incursions of the enemy; and had granted likewise, that they might pass to their children, provided they continued the same defence. This opinion, indeed, is more plausible than any of the rest that derive their origin from the Romans, as these lands were given in consideration of

† Selden. Ibid. Craig, lib. 1. dieg. 5.

* This Emperor, says Lampridius, gave the territories gained on the frontiers, limitaneis ducibus et militibus, ita ut eorum essent si hæredes illorum militarent, nec unquam ad privatos pertinerent; dicens attentius eos militaturos si etiam sua rura defenderent. Addidit sane his et animalia et servos; ut possent colere quod acceperunt, ne per inopiam hominum vel per senectutem possidentium desererentur rura vicina barbariæ, quod turpissimum esse dicebat. See also Molin. in consuet. Paris. tit. 1. de Fiefs, and Loyseau, des Off. lib. 1. chap. 1.

future military service; yet, when we consider, on the one hand, that in no other instance did these estates agree with fiefs, but had all the marks of Roman property; and that, on the other hand, feudal grants were not, for many ages, descendible to heirs, but ended, at farthest, with the life of the grantee, we shall be obliged to allow this notion to be as untenable as any of the foregoing.

The surmise of some others, that the feudal tenancies were derived from the Roman agents, bailiffs, usufructuaries, or farmers, is scarce worth confuting; as these resembled only, and that very little, the lowest and most improper feuds; and them not in their original state, when they were precarious, but when, in imitation of the proper military fief, which certainly was the original, they were become more permanent.

Lastly, Some resort as far as Constantinople for the rise of fiefs, and tell us that Constantine Porphyrogenetus was their founder; but he lived in the tenth century, at a time that this law was already in France, Germany, Italy, and Spain, where it had arrived very near its full perfection, and was therefore undoubtedly his model: So that, tho' we must acknowledge him the first who introduced these tenures into the Roman empire, to find their orignal, we must look back into earlier ages, and among another people.

The pretensions of the Romans having been considered, and set aside, it follows, that this law must have taken its rise among the barbarous nations; but from which of them particularly, remains to be inquired. Some, solicitous for the honor of the

ancient Gauls, quote Cæsar's account of their manners: *eos qui opibus valebant multos habuisse devotos, quos secum ducerent in bella, soldurios sua lingua nuncupatos; quorum hæc est conditio, ut omnibus in vita commodis una cum his fruantur quorum se amicitiæ dediderint; si quid iis per vim accidat, aut eundem casum una ferant aut sibi mortem consciscant* *; in these words they imagine they have plainly the mutual connection between lords and vassals. The Spaniards too put in their claim for the ancient Celtiberians; of whom Plutarch, in his life of Sertorius and Valerius Maximus, gives the same account that Cæsar doth of the ancient Gauls; and Sir Edward Coke, in his zeal for the common law of England, which, although he did not know it, is certainly feudal, relying on fabulous historians, carries its antiquity so far back as to the British kings of Geoffrey of Monmouth. But one short and plain observation will fully dissipate such vain conceits, namely, that, whatever were the original customs of the barbarous nations, inhabiting Gaul, Spain or Britain, they were, many ages before the rise of this law, entirely annihilated and forgotten. Gaul, Spain and and Britain, were, for centuries, Roman provinces, governed entirely by Roman magistrates, according to the imperial laws. For the Romans were particularly studious of introducing their dress, their language, their laws and customs, among the conquered nations, as the surest, and most effectual means of keeping them in subjection.

Hence, it appears, we must find the true original of this law among those nations, that destroyed the

* De bell. Gall. lib. 4. chap. 22.

Western Empire of the Romans; where we first perceive the traces of it, that is, among the Franks, Burgundians, Goths, and Lombards*. Of these the first and last have the greatest number of advocates; and, whether out of jealousy to the French monarchy, or not, I cannot determine, the majority declares for the Lombards. These different opinions, however, may be easily adjusted, by distinguishing between the *beneficiary law*, as I shall call it, while the grants were at will, or for years, or at the utmost for life, and that which is more properly and strictly called *feudal*, when they became transmissible to heirs, and were settled as inheritances. As to the beneficiary law, no one of these nations can lay a better claim to it than another, or with reason pretend that the rest formed their plan upon its model; each of them independent of the other, having established the same rules, or rules nearly the same; which were, in truth, no more than the ancient customs of each nation, while they lived beyond the Rhine, and were such as were common to all the different people of Germany. But as to the law and practice of feuds, when they became inheritances, there can be little doubt but it was owing to the Franks. For the books of the feudal law, written in Lombardy, acknowledge, that the Emperor Conrad, who lived about the year 1024, was the first that allowed fiefs to be descendible in Germany and Italy†; whereas the kingdom of the Lombards was destroyed by Charlemagne above two hundred years before; and he it was who first established among his own Franks the succession of fiefs,

* Montesquieu, L'esprit des loix, liv. 30. chap. 2. and 6.

† Lib. Feud. 1. tit. 1.

limiting it, indeed, only to one descent. His successors, continued the same practice, and, by slow degrees, this right of succession was extended so, that by the time of Conrad, all the fiefs in France, great and small, went in course of descent, by the concession of Hugh Capet, who made use of that device, in order to sweeten his usurpation, and render it less disagreeable*. By this concession he, indeed, established his family on the throne, but so much weakened the power of that crown, that it cost much trouble, and the labor of several centuries, to regain the ground then lost.

The opinion of the feudal law's being derived from the Lombards seems owing to this, that, in their country, those customs were first reduced into writing, and compiled in two books, about the year 1150, and have been received as authority in France, Germany and Spain, and constantly quoted as such.... But then it should be considered, that the written law in these books is, in each of those nations, especially in France, controuled by their unwritten customs; which shews plainly, that they are received only as evidence of their own old legal practices..... For had they been taken in as a new law, they would have been entirely received, and adopted in the whole.

But if, in this point, I should be mistaken, and the Lombards were really the first framers of the feudal law, yet I believe it will be allowed more proper for the person who fills this chair to deduce the progress of it, through the Franks, from whom we certainly borrowed it, than to distract the attention of his audience,

* L'esprit des loix, liv. 31, chap. 31.

by displaying the several minute variations of this law, that happened as it was used in different nations. To the nation of the Franks, therefore, I shall principally confine myself, and endeavor to show by what steps this system of customs was formed among them, and how their constitution, the model of our own just after the conquest, arose ; and at the same time I shall be particularly attentive to those parts of it only that prevailed in England, or may some way contribute to illustrate our domestic institutions.

In order, then, to illustrate the original of the French constitution, and of their beneficiary, and its successor the feudal law, it will be necessary to enter into some details as to the manners of this people, while they continued in Germany, and which they preserved for a considerable time after they passed the Rhine ; as also to mention some few particulars of their history when settled in France, in order to show the reasons of their original customs, and the ends their policy aimed at, and how, by change of circumstances, the preservation of that system required new regulations ; how the feudal law arose, and grew to that pefection, in which, for so many ages, it flourished throughout Europe. As skilful naturalists discover in the seed the rudiments of a future tree, so, in a few passages of Cæsar and Tacitus, concerning the customs of the Germans, may be seen the old feudal law, and all its original parts, in *embryo*; which in process of time, by gradually dilating and and unfolding themselves, grew into a perfect and complete body. It will be highly proper, therefore, for the clearer comprehension of what is to follow, to dwell somewhat particularly upon, and to make our-

selves acquainted with, the manners and institutions of those people; and for this purpose, perhaps, it will be sufficient to consider them under the several following heads, viz. their general disposition and manners, the several ranks and orders of persons among them, their form of government, and the nature of their policy; their regulations touching property, their methods of administering justice, and the nature of the punishments they inflicted on criminals.

First, as to their manners and general disposition: Germany was at that time a wild uncultivated country, divided into a great number of small cantons, separated from each other by thick forests, or impassible morasses, and inhabited by a rude and simple people, who lived either by the chase or pasturage, and were always either in a state of open war, or a suspicious peace with their neighbors: A circumstance that obliged every one of these little states to esteem military virtue in the first place, and to train up all their people, fit for that purpose, in the constant use of arms, and to keep them perpetually in a state ready always for either offence or defence*.

But since, in every number of men, however assembled, some there will be, from the natural strength of their bodies and courage of their minds, more fit for soldiers, and others, from contrary causes, better adapted to the arts of peace; these nations were necessarily distributed into two ranks; those in whom the strength of the society consisted, the freemen or soldiers, who were properly speaking, the only members of the community, and whose sole em-

* Tacitus de moribus Germanorum. Cæsar de bell. Gall. lib. 6.

ployment was war, or (in the intervals of hostilities, what Xenophon considers as its image) hunting; and an inferior order of people, who were servants to them, and, in return for protection, supplied the warriors with the necessaries of life, occupied the lands for them, and paid stipulated rates of cattle, clothes, and sometimes corn, namely, where they had learned the use of agriculture from the neighboring Romans. I follow Craig in calling them servants rather than slaves, as an expression much more suitable to their condition; for they were not condemned to laborious works, in the houses of the freemen, as the slaves of other nations were. Among these simple people, the wives and children even of the greatest among them, and the old men unfit for the toils of war, were their only domestics. The servants of the Germans lived apart, in houses of their own, and when they had rendered to their lords the services due by agreement, they were secured in the rest, as their own property; so that a servant among these people, though meanly considered by the superior rank, was in truth, more a freeman than the generality of the Romans under their Emperors*. It has been an ancient observation, that servitude among the northern nations hath always been more gentle and mild than among those that lay more southerly. A difference, to be ascribed to the different manners of the people, resulting partly from their climate, and partly from

* Servis, non in nostrum morem descriptis per familiam ministeriis utantur. Suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono injungit; et servus hactenus paret. Tacit. de mor. Germ. cap. 25.

their way of life. A plain and simple people, unacquainted with delicacies, were contented with the plainest fare; which was easily supplied, without afflicting their servants with heavy labor, and gave no room for envy and discontent in the breasts of inferiors. And a nation that had always the sword in their hands were too conscious of their own strength, to entertain any apprehensions from those, who, from their unfitness for that profession, were destined to other employments. All motives, therefore, to fear on the one side, and to envy and discontent on the other, being removed, we need not be surprised at the general humanity with which the servants were treated in these northern regions. The putting them in chains was a thing exceedingly rare, and the killing them, except in a sudden gust of passion (an accident which frequently happened among the freemen themselves) was almost unheard of. The only difference in that case was, that the death of a servant was not looked upon as a public crime, he being no member of the political society, and therefore was not punished. Such then was the mutual affection and confidence of these two ranks in each other, that whenever there was occasion, they made no scruple of arming such of their servants as were capable, and, by making them soldiers, admitted them into the number of freemen; and the hopes of such advancement, we may be assured, was a strong inducement to those of the lower rank to behave in their station with fidelity and integrity. Another cause of this great lenity to their servants arose from a custom peculiar to the Germans, which ordained, that insolvent debtors should be reduced to servitude, until, either by his labor, the

creditor was satisfied, or, as it frequently happened, the debt was paid by the insolvent's relations. It was, indeed, reputed dishonorable for the creditor himself to retain his debtor in servitude; but then he either sold him to the prince, or some other person.

Among so plain a people, perhaps it may be thought debts were rare, and that few instances occurred of freemen's being reduced to slavery; but Tacitus assures us of the contrary*. These people were possessed with rage of gaming to such a degree, that nothing was more common than to see them, when all their property was lost, set their liberty itself at stake. It was natural, therefore, to treat those with gentleness, who had been once perhaps the most valuable members of the body politic, especially for them who knew their own privileges depended on the uncertain caprices of the same goddess Fortune, and that an unlucky throw might reduce them to-morrow to the same low condition. I have been the more particular on this head, in order to shew, that even in their infancy, the feudal maxims were more favourable to the natural liberty of mankind, than the laws and customs of the southern and more polite nations, and were of such a spirit, as when circumstances changed, would naturally expand, and extend that blessing to the whole body of the people; as we find it at present in our excellent constitution.

To return, therefore, to the freemen: We find no traces of any different orders of men among them; but as no kind of government, however rude, can

* De mor. Germ. cap. 24.

subsist without some subordination, and as it was impossible for them all to continue together in one body, it was found necessary, in order to disperse them round the country, that they should be subdivided into lesser parties, and to appoint to each a chief, the most eminent and capable among them; who, when a district was assigned him, distributed that among his followers; who again, after having retained what they esteemed sufficient for their own purposes, assigned part of what they had so received to their servants. And here, indeed, we see the first rude original of lords and vassals. These lords were those of whom Tacitus says, *De minoribus rebus principes consultant**. One of these lords, and to him a larger territory was assigned than to the others, was the head of the whole body politic, and honored with the title of king. He was the superior, who, at their general assemblies, made the distribution already mentioned, and appointed the other lords. And besides his excelling the others in the enjoyment of a more extensive district, and in having a greater number of vassals and servants, he was remarkably distinguished from them in two particulars. His office was for life, and, in some degree, hereditary; for, in every nation there was one family, descended, it is to be presumed, from the first founder of the state, or some ancient hero, which was the only family noble by birth among them, and the members of which alone were capable of this high station. Not that these kings succeeded in a lineal, or any other regular course of descent; for Tacitus intimates sufficiently that they were elective, when he says, *Reges*

* De mor. Germ. cap. 11.

*ex nobilitate sumunt**. And indeed any one who considers attentively the circumstances of these people, always either ready to invade their neighbors, or dreading invasions from them, will allow, that any kind of a constant regular succession was inconsistent with their preservation. They were necessitated to choose among the royal family a man in the flower of youth, or, at least, in the vigor of life, who, by his valor and wisdom, might prove the proper head of a nation always in a state of war. This will appear beyond a doubt, if we examine the ancient practice of all the kingdoms founded by the Germans.... Look over the lists of their kings in any one nation, and examine the degree of kindred in which they stood related to each other, and you will find them all indeed, of one family; but you will, at the same time, see that scarce a third of them could derive their kindred, by way of title or descent, from their immediate predecessor; yet were they obeyed cheerfully by their subjects, nor ever looked upon in those days as usurpers, though several modern writers, possessed with opinions of their own ages, since kingdoms are almost universally settled in a regular course of descent, have been so liberal in bestowing that title upon them.

Montesquieu allows this was the manner of succession in the second race of the Franks, but insists that those of the first inherited lineally†. But was this so originally, when Clovis came to the crown, he who first united all the Franks under one sovereign? We find six or seven independent kings of the Salian Franks, every one of them Clovis's near relations,

* Ibid. cap. 7. †L'esprit des loix, liv. 31.

and consequently descended from a common ancestor at no very great distance. He thought not himself, nor his posterity, secure in the possession of the throne, until he had totally extirpated every other branch, and reduced the royal family to his single person. Then, indeed, there was no danger of a competition upon his death. So far was the crown from descending to any determined person, that the kingdom was divided among all his children; and, for several descents, his bloody example was followed in one generation, and in the next a new division took place; nor, in all this time, do we hear of any other title set up, than what followed either from the will of the father, the consent of the people, or the fortune of war; which, it is apprehended, is sufficient to shew, that, in these early ages, there were no invariable rules of succession settled among the Franks. Otherwise, how came the kingdoms to be divisible, and the right heir to be obliged to content himself with a small portion of his supposed legal inheritance*?

In the next lecture I shall give an account of the companions of the prince among the Germans, and finish what I have to observe of the constitution of their governments, and of their laws and customs, unto the time of their entering the Roman empire.

*Mably, Observations sur l'histoire de France, liv. 1. cap. 3.

LECTURE IV.

The companions *of a German prince....The constitution of a German kingdom....The condition of property in Germany ,...The methods followed there of distributing justice, and the nature of the punishments inflicted on criminals.*

BEFORE we can be fully acquainted with all the several constituent parts of the German state, it will be necessary to form a just notion of those who were called the companions of the king or prince; who, being chosen out of the most robust and daring of the youth, and having attached themselves particularly to the person of their sovereign, were his chief defence in war, and the great support of his dignity in times of tranquillity. A few words of Tacitus will set this institution of theirs in a clear light. Speaking of their princes, he says, "This is their principal "state, their chief strength, to be at all times sur- "rounded with a numerous band of chosen young "men, for ornament and glory in peace, for security "and defence in war; nor is it among his own people "only, but also from the neighboring communities, "that a prince reaps high honor, and great renown, "when he surpasses in the number and magnanimity "of his followers; for such are courted by embas- "sies, and distinguished with presents, and by the "terror of their fame alone often dissipate wars. In "the day of battle, it is scandalous for the prince to "be surpassed in feats of bravery, scandalous to the

"followers to fail in matching the valour of the "prince. But it is infamy during life, and an inde- "lible reproach to return alive from a battle wherein "the prince was slain. To preserve him, to defend "him, and to ascribe to his glory all their gallant ac- "tions, is the sum, and most sacred part of their oath. "For from the liberality of their prince they demand "and enjoy that war-horse of theirs, and that terrible "javelin, dyed in the blood of their enemies. In "place of pay, they are supplied with a daily table "and repasts, though grossly prepared, yet very pro- "fuse. For maintaining such liberality and munifi- "cence, a fund is furnished by continual wars and "plunder*."

Here, then, are to be seen most plainly the rudiments of that feudal connection that afterwards subsisted between the king and all his military vassals, and of the oath of fealty which the latter took to him. To his person, and to aid him in all he undertook, his companions were bound, during his and their lives, by the strictest ties; but as to other freemen, who lived apart in their villages, the bonds of allegiance were much more loose. This rude people had no notion of what almost every civilized nation had laid down as a maxim, that being born in, and protected by a society, creates a durable obligation. They served, indeed, in consideration of the lands they held, in all defensive wars; and in all offensive ones, which either were generally approved of, or in which they chose particularly to engage themselves. Nay, so great was the notion of particular independence among these people, that they thought that all of

*De mor. Germ. cap. 13. and 14.

the freemen or soldiers, except the *comites*, who had by oath bound themselves to the person of the king for life, were at liberty to engage in expeditions, that neither the king, nor the majority of the nation consented to; and that under leaders of their own choosing. For as, at their general meetings, war was necessarily the most common subject of deliberation, if any one proposed an enterprize, all who approved the motion were at liberty to undertake it; and if the king declined commanding therein, they chose a general capable thereof; and when, under his conduct, they had succeeded, they either returned, and divided the spoil, and became subjects of their former king as before; or if they liked the country they had subdued better, settled there, and formed a new kingdom under their victorious leader. *Duces ex virtute sumunt*, saith Tacitus; a practice hard to be accounted for among nations exposed to continual danger, and which must be thereby frequently weakened, on any other supposition than that it was first introduced to disburthen a narrow territory, overstocked with inhabitants. This effect, however, it must have had, that their kings were rendered more martial, and obliged equally by their glory and interest, to command in every expedition, that was agreeable to any considerable number of their subjects.

From this custom Montesquieu very ingeniously conjectures, that the Franks derived their right of conferring on their *mairs de palais* the power of war, at a time, when, by the long continued slaughters of the royal family, they were obliged to place the crown on the heads of minors, or of princes as incapable as minors; a power that enabled them, by degrees, to

usurp the civil administration, and at length to transfer the title also of royalty to a new race, in the person of Pepin*.

Such, then, was the face of a German state. A king chosen for his illustrious extraction, attended by a numerous body of chosen youth, attached to his service in war by the strictest bonds of fidelity; a number of freemen divided into villages, over each of which was an elective chief, engaged likewise to military duty, but in a laxer manner; and under all these were the servants, who occupied the greatest part of the land, and supplied the freemen with the necessaries of life.

It is time now to attend a little to their domestic policy, and to inform ourselves what were the rights of each of these orders in the time of peace. The king, we are assured by Tacitus, was far from being absolute†. He was a judge, indeed, among his own peculiar vassals, who lived on his demesne, as the other chieftains were in their respective districts.... He presided in their general assemblies, and was the first who proposed matters for their deliberation.... His opinion had great weight, indeed, from his rank and dignity, but his power was rather that of persuasion than of command. The royal family was no otherwise distinguished from others, than as their personal merit acquired influence, or their high birth and capability of succession engaged respect. The companions of the prince were highly honored for their faithful attachment to him, and their valorous atchievements in war; but, as to rights and privi-

* L'esprit des loix, liv. 31.

† De mor. Germ. cap. 7. 12. and 14.

leges, were on the common footing of other freemen. The only distinction was between the chieftains, or lords of the villages, and the vassals who were under their jurisdiction. The chieftains were judges in their respective districts; but, to prevent partiality, to each of them were assigned an hundred persons, chosen among the populace, to accompany and assist him, and to help him at once with their authority and their counsel. And this institution was, in all probability, the original of the jurisdiction of the *pares curiæ* in the feudal law. Another, and a very great check on their chieftains, was their being elective, and consequently amoveable every year, if their conduct was displeasing either to prince or people. These elections, as well as those of their assessors, were made in their assemblies; where indeed, every thing of any consequence was transacted, and therefore they deserve to be particularly treated of.

These conventions then, unless they were summoned on extraordinary occasions, were regularly held once a month, on certain stated days; but such was the impatience of this people of controul, or any regularity of proceeding, that Tacitus observes, that frequently two or three days were spent before they were all assembled. For in these meetings, every freeman, that is, every soldier, had an equal voice. They appeared all in arms, and silence was proclaimed by the priests, to whom also it belonged to keep the assembly in order, and to punish all disturbers of its regularity. The king in the first place was heard, next such of the chiefs as had any thing to propose, and lastly others, according to their precedence in age, nobility, military virtue, or eloquence. If the

proposition displeased, they rejected it by an inarticulate murmur. If it was pleasing, they brandished their javelins; the most honorable manner of signifying their consent being by the sound of their arms. But this approbation of the general assemblies was not of itself sufficient to establish a resolution. As the sudden determinations of large multitudes are frequently rash, and injudicious, it was found necessary to have what they had so determined reconsidered by a select body, who should have a power of rejecting or confirming them. For this purpose the chieftains were formed into a separate assembly, who, in conjunction with the king, either disannulled, or ratified what had been agreed to by the people at large.*

Such then was the constitution of a German kingdom, a constitution so nearly resembling our own at present, as at first view would tempt any one to think the latter derived immediately from thence. Yet this was not the case. With respect to the Saxon times, as far as we can judge from the few lights remaining, the form of government seems very nearly to resemble this account which Tacitus gives us; but for two centuries, at least, after the conquest, the English constitution wore a face purely feudal. The sub-vassals had long lost the privilege of being members of the general assembly, from causes that shall be hereafter attempted to be explained; and the whole legislative power was lodged in the king and his immediate vassals, whose interests frequently clashing, and creating continual broils, it was found necessary, for the advantage both of the sovereign

*Ibid. cap. xi.

and nobles, that a proper balance should be formed. Accordingly, much at the same time in France, Spain, and England, namely, in or about the thirteenth century, the happy method of readmitting the third estate, by way of representation, was found out, with an addition very favorable to the natural rights of mankind, that traders and artizans, who before had been treated with the most sovereign contempt, were now permitted to make part of the general assembly, and put on an equal footing with other subjects.*

But to return to the assembly of German chieftains, or their house of lords, as I may call it; besides a share in the legislative power, they were likewise a council, to assist the king in the execution of the resolutions of the general assembly, and determined solely by their own authority all matters of lesser moment, that did not immediately affect the whole community. *De minoribus rebus principes consultant, de majoribus omnes.*

Many other things were likewise transacted in these general assemblies, as particularly the admission of a new member into the political society.... When a youth was judged capable of bearing arms, he was introduced by his relations into the assembly; and if they testified his capacity of wielding them, he was dignified with a lance and javelin by one of the chieftains, or by his father, or some other near relation. This was his *toga virilis*. Then, and not before, was he emancipated from the family he belonged to, was permitted to become a soldier, and

*Muratori, Antiq. Ital. vol. 4. p. 160. et Seq. Mably, Observations sur l'histoire de France, tom. 2. p. 96. et Seq. Madox, Firma Burgi, cap. 1. sect. 9.

in consequence admitted to all the privileges of a free subject. A practice that, in after ages, gave rise to the solemn and public manner of creating knights*.

This, likewise, was the proper place of accusing criminals of public crimes, namely such as were looked upon by those particularly to affect the whole society; neither was it unusual, likewise, to bring hither accusations of private wrongs, if the party injured was apprehensive of partiality in his own canton.

But the business of greatest moment, next to legislation, was, that once in a year, in these assemblies, each village, with the approbation of the king, chose their chiefs, and their hundred assistants†. Here it was they either received a testimony of their good behavior, by being continued in office another year, or saw themselves reduced to the rank of private subjects, if their conduct had not been acceptable.... At the same time were the lands distributed to the several chieftains, which leads me to say something on the next head, their regulations with respect to property; as to which their institutions were very singular, and totally different from those of all ancient, as well as modern nations.

All property being then naturally divisible into two kinds, moveable and immoveable, of the first of these, people had but a scanty share, their whole wealth consisting in their arms, a few mean utensils, and perhaps some cattle. The use of gold and sil-

* Tacit. de mor. Germ. c. 13. Spelman's Glossary, voc. Miles.

† Tacit. de mor. Germ. cap. 12.

ver, in the way of commerce, was utterly unknown to them, except to a few of their nations, namely such as lived near the Rhine, and had acquired some by dealing with the neighboring Gauls. Consequently, there was no such thing as an accumulation of wealth among them, or any great disparity in the distribution of this kind of property, over which each had uncontrouled dominion during his life. But as testaments, or last wills, were unknown amongst them, upon death, the right went according to the plain dictates of nature. Tacitus saith, "To every man "his own children were heirs and successors. For "want of them, his nearest of kin, his own brothers, "next his father's brothers, or his mother's."... Whatever there was, was divided among the males next in degree; save that to each of the females, a few arms were assigned, the only dowry in use among those people; a dowry which, as Tacitus saith, signified that they were to share with their husbands in all fortunes of life and death. Accordingly, they constantly attended them to the field, were witnesses of their valor, took care of the wounded *; and often, if their party had the worst, they ran into the ranks, and by their presence and danger, animated the men to renew the charge.

But with respect to real or landed property, the case was very different. Here a man had only the use, or enjoyment of the profits; and that, too, but a temporary one. The real property, or *dominium verum*, was lodged in the community at large; and was, at the end of every year, cantoned out, and dis-

* Hi cuique sanctissimi testes, hi maximi laudatores.... Tacit. de m. G. c. 7. Consult also c. 5, and c. 18.

tributed to the several tribes of the people; and the portion assigned to each was after that subdivided to the respective individuals; who by these means were perpetually removed from one part of the territory to another; nor could any man tell in what place his lot was to fall the next year*. And this custom, absurd as it seems to us, they were so fond of, as to continue for some time after they settled in the Roman territories; until, growing by degrees acquainted with the conveniencies of life, a change of manners was introduced, and they wished for more settled habitations. Then came into use grants for terms of years, after for life, and lastly, estates descendible to heirs, which are those we, properly speaking, called *fiefs*. This continual removal of habitation, so intolerable to a people any way accustomed to comfortable dwellings, was no manner of inconvenience to them. Their little substance was easily removed, and two or three days were sufficient to erect a sorry hovel, which contented the wishes of the

* It is to be wished, that our ingenious Professor had here entered more at large into the history of property in land. The subject is important and little understood.... The conceptions entertained by the ancient inhabitants of Germany and Gaul concerning property have been explained and illustrated in a book, intituled, "An historical "Dissertation concerning the Antiquity of the English "Constitution." The author of this treatise seems to be the first who has remarked that land is originally the property of nations, and has attempted to account for the manner in which it comes to descend to individuals. See Hist. Dissert. part 1. sect. 3. See also Professor Millar's valuable work on the Distinction of Ranks in Society, p. 165. et seq. 2d edition.

greatest among them*. But their passion for this constant change of place seems derived from that condition which I have already observed they were in, namely, a middle state between hunters and shepherds; and that they still retained that practice, was an evidence that they had not been long reclaimed from a savage life. Tacitus indeed says, that, in the intervals of war, they were not much employed in hunting, but lived a lazy and inactive life. This, however, I apprehend, must be understood only of a few nations, nearest to the Romans, where game was not so plentiful, and not of all the Germans in general: for it is certain the Franks had a strong passion that way, after they were settled in Gaul; and from them the plan of the forest laws, so justly complained of in England, after the conquest, was derived. And true it is, that whole nations, as well as individuals, were possessed with this rambling inclination; and that, not always with a view of settling in a better country. If the Germans changed their barren wilds for the warm sun and fertile climate of Gaul, we are assured by the same authority, that many tribes of the Gauls, on the other hand, removed to the forests of Germany. If Jornandes tells us, that the Goths quitted the bleak and barren mountains of Scandinavia for the pleasant banks of the Danube, he likewise informs us, that, afterwards, they returned back into their native country.

As to their methods of administering justice, I have already observed, that their chieftains, in the several districts, assisted by their assessors, were

*Cæsar, de bell. Gall. lib. 4. c. 1. Lib. 6. c. 22. Tacit. de mor. Germ. c. 26.

their judges. Before them all causes were brought, which were not discussed in their general assemblies; but as to the manner of investigating the truth, all the German nations did not agree. Nay, the Salian Franks differed considerably from their brethren, the Ripuarian Franks. If the judge, or his assessors, or any of them, had knowledge of the fact in dispute, which often happened, as these people lived much in public, and in the open air, they gave sentence on such their knowledge. This was common to them all; but if there was no such knowledge in any of the *pares curiæ*, as I may call them, and the fact in question was denied, the Salians proceeded thus :... The accuser or plaintiff produced his witnesses, the accused did the like; and on comparing the evidence on both sides, the judges gave sentence. If the plaintiff had no witnesses, the defendant, on his denial, was dismissed of course. If the witnesses for the plaintiff failed in fully proving the point, and yet their testimony was such, as induced a presumption which the other party was not able to remove, the trial was referred to the ordeal*. That of boiling water was the most usual among them. The manner was thus: The person suspected plunged his hand into the boiling water, which was afterwards carefully closed up, and inspected at the end of three days: If no sign of the scalding then appeared, he was acquitted; if otherwise, he was esteemed guilty†.

It is strange that any people should, for ages, make

*Du Cange, Glossarium voc. Juramentum. Georgisch, corp. juris Germanici antiqui.

†Spelman, Gloss. voc. Lada et Ladare. Struv. Hist. jur. criminal. sect. 9.

use of such a method, which a very little reflection, or common experience, might easily satisfy them had no manner of connection with guilt or innocence.... But, besides the gross superstition of these nations, who thought the honor of providence concerned in the detection and punishment of criminals, Montesquieu hath given us another reason for this practice, which, whether just or not, for its ingenuity, deserves to be taken notice of. He observes, that the military profession naturally inspires its votaries with magnanimity, candor, and sincerity, and with the utmost scorn for the arts of falsehood and deceit. This trial, then, he imagines calculated to discover plainly to the eye, whether the person accused had spent his whole life in the arts of war, and in the handling of arms. For if he had, his hands would thereby have acquired such a callousness, as would prevent any impression from the boiling water, discernible at that distance of time. He therefore was acquitted, because it was presumed he would not screen himself by a falsehood. But if the marks appeared, it was plain he was an effeminate soldier, had resisted the force of education, and the general bent of his countrymen; that he was not to be moved by the spur of constant example, that he was deaf to the call of honor; and consequently such a person whose denial could have no weight to remove the presumption against him.*

These were the methods of trial among the Salians, but the Ripuarian Franks, the Burgundians, and several other German nations acted very differently. No witnesses were produced among them on either

*L'Esprit des Loix, liv. 28, ch. 17.

side, but they contented themselves with what were called negative proofs; that is, the person accused swore positively to his own innocence, and produced such a number of his relations as the custom of the country required: or if he had not relations enough, the number was made up out of his intimate acquaintance: These were to swear that they believed his oath to be true, and upon this he was acquitted. But if he declined the oath, or could not produce a sufficient number of compurgators, he was found guilty; a practice that fully proves these nations were, when this method was introduced, a people of great simplicity and sincerity*.

But as, by this means, every profligate person, with the assistance of a few others as wicked as himself, was sure to escape, the defects of this kind of trial introduced another, or rather revived an ancient one, no less inconclusive. Anciently, the Germans had no judicatures for the decision of private wrongs; but each in person took his own satisfaction, and this introduced perpetual combats. When the new method of trial came in use, a party seeing his adversary ready to defeat his just demands, and screen his injustice with perjury, resorted to his ancient right, refused to accept the oath, and appealed to the providence of God by the trial of battle: a method as absurd, indeed, as the former, but peculiarly adapted to the way of thinking of the Germans, who frequently, before they entered into a war, prognosticated the success of it from the event of a combat between one of their own nation, and a cap-

*Georgisch, corp. juris Germanici antiqui, p. 347, and p. 368.

tive of the enemy*. This kind of trial gained ground among all the descendants of this ferocious people†, and introduced itself at length among the Salians, who had it not at first, and who, by admitting positive proofs, had no need of it; and, though long fallen into disuse, hath left behind, its offspring, private duelling. It hath been long since observed, that this fashionable custom owed its origin to these northern nations, the ancestors of the present inhabitants of Europe, as no other nations, ancient or modern, however martial or disposed to war, had any knowledge or practice of it; but it is undeniably evinced by this, that as a lie, above all other provocations, is the strongest, and what lays gentlemen of honor under an indispensible necessity of duelling, so were *you lie* the very words mutually given and received in old times, the accustomed forms of joining issue by battle, after which, neither party, without perpetual infamy and degradation from his rank, could recede.

I have taken the more notice of these four different methods of trial among the old Germans, as every one of them has been received into England. Concerning the first, the trial by witnesses, little need be said. As it is the fairest, and the justest, it has accordingly, pursuant to the practice of all civilized nations, prevailed over all the rest; and it is that, and that only, that we use at this day. But the or-

*Du Cange, Gloss. voc. Duellum. Spelman, voc. campus. Selden's Duello, or Treatise on Single Combat, ch. 5.

†Georgisch, corp. juris Germanici antiqui, p. 980, 1063, 1223, 1267, 1270.

deal also was in use among the Saxons, and continued some time after the Norman conquest; as appears, not only by the old records of the law, but from the famous story, whether true or false, of queen Emma, mother of Edward the Confessor, and the plow-shares*. The trial by negative proofs, though out of practice, is still in being, in what is called by us the *wager of law*; where, if a person is impleaded in an action of debt, on a simple contract, he may clear himself, by swearing he oweth it not, and by producing eleven others, who swear to their belief he has deposed the truth†. Hence it has happened, that for a long time past, *actions of debt*, in such cases, have not been brought, but another, called an *action on the case*, is the usual method, which admits the parties on both sides, as to the point of debt, *vel non debet* to an examination of witnesses.... For the last, the trial by battle, our old books are full of it, in real actions; and although, to prevent the inconvenience and uncertainty of it, the grand assize was invented; yet was it in the tenant's, that is, the defendant's option, to choose which method of trial he pleased. The latest instance of joining issue by battle, I have met with, is in Dyer's Reports, in the beginning of Elizabeth's reign‡; but by this

*Selden, Analecta Anglo-Britannica, lib. 2. cap. 8.

†Brady's Hist. of England, p. 65.

‡Mr. Barrington has remarked, that "the last trial by "battle in England was in the time of Charles I. and that "it did not end in the actual combat." Observations on the Statutes, 3d edition, p. 202. The last instance which occurs of the judicial combat in the history of France, was the famous one between M. Jarnac and M. de la Chaistaig-

time it was so much discouraged, that, by force of repeated adjournments, the parties were prevailed on to agree, and judgment was at length given upon the failure of one of the parties appearing on the day appointed for the combat.

When the truth, by some of the methods abovementioned, was ascertained, judgment was to be given. Here it will be proper to observe, that, among these people, there were only two kinds of crimes, that were looked upon as public ones, and consequently capital. The first was treason, or desertion in the field, the punishment hanging; the second cowardice, or unlawful lust, for they were strict observers of the nuptial band, the punishment stifling in a morass, with an hurdle over them. It seems, at first view, surprising, that murder, which Tacitus assures us, from sudden gusts of passion, and intemperance in liquor, was very frequent, should not, as it so much weakened the strength of the nation, be considered as a criminal offence, and punished accordingly*. But a little reflection on their situation will reconcile us to it. The person slain was already lost to the society, and if every murder was a capital offence, the state would lose many of its members, who were its chief supporters. Besides, if the slayer had no hopes of mercy, nothing else could be expected than his desertion to their enemies, to whom he could be of infinite service, and to them of infinite detriment, from his knowledge of their strength and circumstances, and of the passes

nerie, A. D. 1547. Dr. Robertson's Charles V. vol. 1, p. 298.

*Tacit. de mor. Germ. cap. 12, and 25.

into their country, through the morasses and forests, which were their chief defence. Murder, therefore, like other lesser crimes, was atoned among those people, as it was among the ancient Greeks, who were in pretty similar circumstances, in the heroic times, as Ajax assures us in these words, in the ninth Iliad:

Και μεν τις τε καστγνητοιο φονοιο
Ποινην, η τε παιδος ιδιζεται τεθνιωτος,

namely, by a satisfaction of cattle, corn, or money, to the persons injured, that is, to the next of kin to the deceased, with a fine to the king or lord, as an acknowledgment of his offence, and to engage the society to protect him against the future attempts of the party offended. These satisfactions were not regulated originally, nor fixed at any certain rate, but left to the discretion of the injured, or next of kin.... However, if he appeared extraordinarily unreasonable, and refused what was judged competent, the society, upon payment of his fine to their head, took the offender into protection, and warranted his security against the attempts of the other party, or his friends. After these nations were settled in the Roman empire, these satisfactions for each offence were reduced to a certainty by their laws*.

This is as much as I have thought necessary to observe at present, concerning the manners and customs of these people, while they remained beyond the Rhine. It will next be proper to see how far afterwards they retained them, and what alterations were introduced by their new situation.

*Lindenbrog. Cod. Leg. Antiq. p. 1404. Tacit. de mor. Germ. c. 21. Ll. Wal. by Wotton, p. 192, 194. Ll. Anglo-Saxon, ap. Wilkins, p. 18, 20, 41. Hickes. Dissert. Epist. p. 110. Georgisch, corpus jur. Germ. antiq.

LECTURE V.

The decline of the Roman empire....The invasions of the Northern nations....The manner in which they settled in the Roman provinces....The changes insensibly introduced among them in consequence of their new situation....The policy and condition of the Franks after they had settled in France.... The rise of the feudal law....Estates beneficiary and temporary.

IT is full time now to quit the wilds of Germany, to attend these nations in their passage into the Roman dominions, and to take a view of the manner wherein they settled themselves in these new countries. The Roman empire had been long on the decline; but especially from the time of Severus, it every day grew weaker. This weakness arose, in a great measure, from an excessive luxury, which disqualified not only their great ones, but the bulk of the Roman people for soldiers; and also from the tyrannical jealousy of their emperors, who were afraid of trusting persons of virtue or ability, and had no other method of supporting their authority, than by employing numerous standing armies, that, under them, pillaged and oppressed the defenceless populace; and lastly, from the licentiousness of the soldiery, who made and unmade emperors according to their wild caprices. Hence proceeded many competitions for that dignity, and continual battles and slaughters of their men at arms; the natural consequence of which was, that whoever prevailed in these bloody contests,

always found himself less able and powerful to defend the empire from foreign enemies, or domestic competitors, than his predecessor was*.

About the year 200 after Christ, the several nations who had been hitherto cooped up beyond the Rhine and the Danube, and kept in some awe by the terror of the Roman name, began to gather some courage from the weakness of the empire; and from that time few years passed without incursions into, and ravages of, some part of the southern territories, by one or other of these people; and how redoubtable they became to that decaying state, may easily be judged from the particular fondness the emperors of those days had, upon every slight advantage gained over them, for assuming the pompous titles of Gothicus, Vandalicus, Alemannicus, Francicus, &c. not for the conquest, or reducing into subjection those several people, as in ancient times, but merely for having checked them, and kept them out of the Roman boundaries†.

But these invasions of the northern nations were a long time confined to the single views of rapine and plunder; for as yet they were not fully convinced of their own strength, and the enfeebled condition of their enemies. And perhaps they might have longer continued in this ignorance, and within their former bounds, had it not been for an event that happened about the year 370, the like to which hath several times since changed the face of Asia. I mean a vast

*Montesquieu on the Rise and Decline of the Roman Empire. Dr. Geddes, in his Tract concerning the nations which overturned the Empire of the Romans, p. 21—26.

†Selden's titles of honor, part 1. chap. 5. § 1.

irruption of the Hunns, and other Tartarian nations into the north of Europe. These people, whether out of their natural desire of rambling, or pressed by a more potent enemy, were determined on a general change of habitation; and, finding the invasion of the Persian empire, which then was in its full grandeur, an enterprize too difficult, they crossed the Tanais, and obliged the Alans and Goths, who lived about the Borysthenes and the Danube, to seek new quarters. The former fled westward to Germany, already overloaded with inhabitants; and the latter begged an asylum from Valens in the eastern empire, which was willingly accorded them. The countries south of the Danube were before almost entirely depopulated by their frequent ravages. Here, therefore, they were permitted to settle, on the condition of embracing the Christian faith; and it was hoped they, in time, would have proved a formidable barrier against the encroaching Hunns, and by a conformity of religion, be at length melted into one people with the Romans. For the attaining this purpose, they were employed in the armies, where, to their native fierceness and bravery, they added some knowledge of discipline, the only thing they wanted; and many of their kings and great men were in favor at court, and either supported by pensions, or raised to employments in the state*.

But the injudiciousness of this policy too soon appeared; and indeed it was not to be expected that a people used entirely to war and rapine, and unaccus-

*Procop. de bel. Goth. ap. script. Byz. Jornandes, Paulus Warnefridus, Gregory of Tours. Mably, observations sur l'histoire de France, tom. 1 chap. 1.

tomed to any other method of subsistance, could in a short time be reduced to the arts of social life, and to the tillage of the earth; or be retained in any moderate bounds, in time of peace, when, by being admitted within the empire, they saw with their own eyes the immense plunder that lay before them, and the inability of the Romans to oppose their becoming masters of it. During the life of Theodosius they remained in perfect quiet, awed by his power and reputation; but when he left two weak minor princes under the guardianship of two interested and odious regents, it was obvious they could not be bridled much longer. Though, if we are to credit the Roman historians, their first irruption was owing to the jealousy Ruffinus, the prime minister of Arcadius, entertained of Stilichō, the guardian of Honorius. This latter, it is said, ambitious of holding the reins of both empires, pretended, that Theodosius had on his death-bed appointed him sole regent of both. For, though Arcadius was now of sufficient age to govern of himself, he was, in truth, for want of capacity, all his life a minor. Ruffinus, we are told, conscious of his rival Stilicho's superior talents and power, resolved to sacrifice his master's interest rather than submit to one he so much hated; and, accordingly, by his private emissaries, stirred up both Goths and Hunns, to fall at once on the eastern empire*.

In the year 406, these nations, so long irreconcileable enemies to each other, poured their swarms in concert into the defenceless dominions of Arcadius. The Hunns passed by the Caspian sea, and with un-

*Giannone's hist. of Naples, lib. 11. cap. 4.

relenting cruelty ravaged all Asia to the gates of Antioch; and at the same time the Goths, under the so much dreaded Alarick, with no less fury, committed the like devastations in Illyricum, Macedon, Greece, and Peloponnesus. Stilicho, thinking that his saving the eastern empire would undoubtedly accomplish for him his long wished-for desire of governing it in the name of Arcadius, as he did the western in that of Honorius, hasted into Greece with a well-appointed army. But, when he had the barbarous enemy cooped up, and, as it were, at his mercy, the weak prince, instigated by his treacherous minister Ruffinus, sent him orders to retire out of his dominions. The Goths returned unmolested to the banks of the Danube, laden with plunder; and Stilicho went back to Italy boiling with rage and resentment, but he never had an opportunity of wreaking his vengeance on his treacherous rival.

In the next year, Germany, surcharged with her own inhabitants, and the nations who fled from the Huns, and, perhaps, instigated by Ruffinus, to find work for Stilicho at home, sent forth her multitudes across the Rhine; and, for three successive years, the Suevians, Alans, Vandals, and Burgundians, laid all the open country of Gaul waste; and, about the same time, Constantine, a Roman Briton, assumed the imperial purple, and was acknowledged by all the Romans of that island and Gaul.

The western empire was now utterly disqualified for defence: Stilicho, the only man whose abilities and influence were capable of saving the falling state, had been suspected of treason in aspiring to the diadem, and was put to death; and Alarick, having be-

fore effectually plundered Greece, was now acting the same part in Italy, while Honorius, shut up in Ravenna, made but feeble efforts of resistance. Twice was Rome besieged, once redeemed by an immense ransom, and the second time taken, plundered and burnt. At length these calamities a little subsided; Constantine, the British usurper of the Empire, died; and all the western Romans again acknowledged Honorius; but the western empire, though she lingered sometime, had received her mortal wound, and utterly perished in less than fifty years. The distressed emperor Honorius granted to the Burgundians, who were the most civilized of these barbarians, and had embraced the Christian religion, the country they had possessed themselves of, namely, Alsace, and Burgundy. The Goths, who were already Christians, but of the Arian persuasion, having by this time exhausted Italy, were easily prevailed on, under Ataulphus, Alarick's successor, to settle in the south-west of Gaul, under a like grant; which country had been quitted in the year 410 by the Sueves, Alans and Vandals, who had over-run all Spain, and divided it into three kingdoms. And thus were two kingdoms formed in the south of Gaul, the new inhabitants of which coming by compact, and under the title of the Roman emperor, behaved afterwards to the subjected Romans and Gauls, not in the light of brutal conquerors. Though they themselves retained their own customs, they indulged these in the use of the Roman laws, suffered them to enjoy a considerable portion of the lands, and made no very afflicting distinctions between themselves and their subjects.

The Burgundians, particularly, we are informed, took two thirds of the lands, the pasturage and forests, with one third of the slaves to look after their flocks, and left the remainder to the Romans, who were skilled in agriculture. They also quartered themselves in the houses of the Romans, which naturally produced an acquaintance and amity between the two nations. But one great reason, as I apprehend, of the lenity of these people to the vanquished (and a similar one will account for the Ostrogoths and Lombards in Italy, afterwards, following their example, which likewise hath been taken notice of with wonder by some authors) was their neighborhood to the Roman empire, which still continued in name in the west, and which they might well be afraid of seeing revived, under a prince of ability, if their harsh treatment alienated the conquered people's affections from them*.

But different was the treatment the conquered met with from the Franks, who about this same time settled themselves at a greater distance from Italy, namely, in Belgic Gaul. The Franks, above most of the other German nations, had been, for a considerable time attached to the Romans, insomuch, that if they did not receive their kings from them, as Claudian tells us they did from Honorius, at least the kings received their confirmation from the emperors; and they continued in this fidelity till the year 407, when they fought a bloody battle with the Sueves, Vandals, and Alans, to prevent their passing the

* Bouquet, le droit public de France, éclairci par les monumens de l'antiquité, p. 6---10. Montesquieu, l'Esprit des loix, liv. 30. chap. 6, 7, 8, 9.

Rhine, to invade the Roman territories. But when they found the western empire already dismembered, they thought it not convenient to lie still, and suffer other nations to share the prey entirely amongst themselves. The Salians, therefore, took possession of the present Netherlands, and the Ripuarians to their original country of Mentz and Hesse, added Treves, Cologne, and Lorrain. Some have thought these people had grants from the Roman emperor, in the same manner as I have mentioned before concerning the Burgundians and Visigoths; but I should, with others, apprehend this to be a mistake; for Ætius, the Roman general, left the Goths and Burgundians in quiet possession of their seats, but defeated, and obliged the Franks to repass the Rhine, which made them, after the danger was over, return with double fury; and for a long time after, they treated the conquered Romans in the stile of masters, and with many afflictive distinctions, unknown to their neighbors the Goths and Burgundians*.

Many, in the first heat of victory, they reduced to slavery, to a servitude very different from what had been before practised in Germany, and nearly approaching to what was used by the Romans. For whatever property was acquired by these slaves or servants, who in after ages were called villains, belonged to their masters, not absolutely, as at Rome; but the masters claimed and took possession of it, and they (I mean in France) for the enjoyment of what was permitted them, paid a stipulated tax called *census*, which was the only tax used there in those

*Reliq. Spelm. p. 2—7,

ancient times. However, they did not employ them in domestic drudgery, but suffered them to live apart, as the proper German servants had done. Their duties were uncertain, in this agreeing with those of the men of war, and differing from those of the middle rank, which I shall hereafter mention, and were of the most humiliating kind, they being obliged to attend at their lord's summons, to carry out dung, remove nuisances, and do other mean and servile offices. The number of these slaves and villains for centuries perpetually increased, from the many wars both foreign and civil, these people were engaged in, and the *jus gentium* of those ages, by which all that were taken in war were reduced to slavery; insomuch, that by the year 1000, the number of these villains was immense, whole cities and regions being reduced to that state*.

This introduction of a new order of men, unknown to the original German policy, and inferior to all others, was of advantage to that which had been before the lowest, I mean the *servants*, as they were called in Germany, or *socage tenants*, as they were called in England; for the duties which they paid their lords were fixed at a certain rate, which being performed, they were chargeable with no other burthens, and, though no members of the body politic, as having no share in the public deliberations, either in person, or by representation, were in reality free men. These, with the addition of several of the captive Romans, who were most skilful in agriculture, were the successors of the old servants in Germany; but their

*Potgiesser, de stat. servorum, lib. 2. cap. 1. Montesquieu, l'Esprit des loix, liv. 30. chap. 14. Du Cange, voc. Servus.

numbers, from the causes before-mentioned, the perpetual wars, continually decreased, great multitudes of them being reduced into the state of villainage†.

The soldiers, who were really what composed the nation, continued for a longer time pretty much in the same state as in Germany; for a whole people do not part with their accustomed usages and practices on a sudden. They changed their habitations as before, their manner of judicature and administering justice continued the same, they met in general assemblies as usual, but, as they were now dispersed over a more extensive country, not so frequently as formerly. When they were converted to Christianity, which happened under Clovis, who, by uniting all the Franks, subduing the Alemans, and conquering considerable tracts of country from both the Visigoths and Burgundians, first formed a considerable kingdom, it was found exceedingly inconvenient to assemble every month. Thrice in the year, namely on the three festivals, was found sufficient, except on extraordinary occasions; and this method was continued many ages in France and in England. For hundreds of years after the conquest, these were the most usual and regular times of assembling parliaments.

But though things, in general, wore the same face as when these people remained at home, it will be necessary to observe, that a change was insensibly introducing, the kings and the chieftains were daily increasing their privileges, at the expence of the common soldiers, an event partly to be ascribed to

†Spelman. reliq. 12, 14, 248. Muratori antiq. Ital. vol. 5. p. 712.

the general assemblies being less frequent, and consequently fewer opportunities occurring for the people at large to exert their power; but principally to the many years they had spent successively in camp, before they thought themselves secure enough to disperse through the country. The strictness of military discipline, and that prompt and unlimited obedience its laws require, habituated them to a more implicit submission to their leaders, who, from the necessities of war, were generally continued in command. And it is no wonder that while the authority of the inferior lords was thus every day gaining strength, that of the king should encrease more considerably. For, probably, because he, as general, was the fittest person to distribute the conquered lands to each according to his merits, he about this time assumed to himself, and was quietly allowed the entire power of the partition of lands. They were still, and for some considerable time longer, assigned in the general assemblies, but according to his sole will and pleasure, to the several lords, who afterwards subdivided them to their followers in the same manner at their discretion; whence it came, that these grants were called benefices, and are constantly described by the old writers, as flowing from the pure bounty and benevolence of the lord*.

A power so extraordinary in a king would tempt any one at first view, to think that he who had so unlimited a dominion over the landed property, must be a most absolute monarch, and subject to no manner of controul whatsoever. It will therefore be

*Brussel, usage des fiefs, liv. 2. Selden's tit. of honor, part 2. cap. 1. § 23. and § 33.

proper to make an observation or two, to shew why, in fact, it was otherwise. First, then, the ascendant the lords had gained over their followers, made it extremely dangerous for the king to oppress the lords, lest it might occasion, if not a rebellion, at least a desertion of them and their people. For the bonds of allegiance, except among the companions of the king, as I observed before, were not yet fully tied. On the other hand, the interest of the lords obliged them to protect their inferiors from the regal power. Secondly, this power of the king, and of his lords under him, was not unlimited in those times, as it may appear to be at first sight, and as it became afterwards. For, though he could assign what land he pleased to any of the Franks, he could not assign any part to any other but a Frank, nor leave any one of the Franks unprovided of a sufficient portion, unless his behavior had notoriously disqualified him*.

But the strongest reason against this absolute power in those times, is to be drawn from the common feelings of human nature. As absolute monarchies are only to be supported by standing armies, so is an absolute unlimited power over that army, who have constantly the sword in their hands, a thing in itself impossible. The Grand Seignior is, indeed, the uncontrouled lord of the bulk of his subjects, that is, of the unarmed; but let him touch the meanest of the janizaries, in a point of common interest, and he will find that neither the sacredness of the blood of Ottoman, nor the religious doctrine of passive obedience, can secure his throne. How then could an elective

*Mably, observations sur l'histoire de France, liv. 1. chap. 5 and 6.

prince, in these northern regions, exercise an uncontrouled dominion over a fierce people, bred up in the highest notions of civil liberty and equality? One of their old maxims they long religiously adhered to, that is, that, in consideration of their lands, they were bound to serve only in defensive wars; so that a king who had engaged in an offensive one, had every campaign a new army to raise by the dint of largesses; which if he had no treasure left him by his predecessor, as he frequently had, and which every king by all means was diligent in amassing, he supplied from the profits of his demesns, the *census* on his villains, or else from foreign plunder*.

But these people had not long been settled in their new seats, before the increase of their wealth, and the comfortableness of their habitations, rendered a constant removal inconvenient, and made them desirous of more settled assurance in their residence, than that of barely one year. Hence it came, that many were, by the tacit permission of the king, or the lord, allowed to hold after their term was expired, and to become what our law calls *tenants by sufferance*, amoveable at any time, at the pleasure of the superior; and afterwards, to remedy the uncertainty of these tenures, grants for more years than one, but generally for a very short term, were introduced. The books of the feudal law, written many hundred years after, indeed, say that the first grants were at will, then for one year, then for more; but I own I cannot bring myself to believe that these conquerors, who were ac-

*Gregor. Turonen. lib. 2. cap. 27. Usage des fiefs, par Brussel, liv. 2. cap. 6. Dissertation on the antiq. of the English constitution, part 3. § 2.

customed in Germany to yearly grants, could be satisfied with a tenure so precarious as under that of a year, in their new acquisitions. These grants at will, therefore, which are mentioned in those books, I understand to be after their term ended. I mean this only as to the warrior-Franks, for as to the socagers and villains, I will readily allow that many of the former, and all the latter, were originally at pleasure*.

About this period, as I gather from the reason and circumstances of the times, was introduced the tenure of castleguard, which was the assignment of a castle, with a tract of country adjacent, on condition of defending it from enemies and rebels. This tenure continued longer in its original state than any other; for by the feudal law it could be granted for no more than one year certain†.

It is time now to take notice of such of the Romans as lived among the Franks, and by them were not reduced to slavery. Clovis began his conquests with reducing Soissons, where a Roman general had set himself up with the title of a king; and after he had extended his conquests over all the other states, the Franks, and some other German nations, the Armorici, the inhabitants of Brittany, who, cut off from the body of the empire, had for some time formed a separate state, submitted to him on condition of retaining their estates, and the Roman laws. Their example was soon followed by others. The Gauls who dwelt on the Loire, and the Roman garrisons

*Lib. feud. 1. tit. 1. Hume appendix, 2. Dalrymple, Essay on feudal property, cap. 5. § 1.

†Coke on Littleton, lib. 2. chap. 4.

there, were taken into his service. Thus was the king of France sovereign of two distinct nations, inhabiting the same country, and governed by different laws. The Franks were ruled by their customs, which Clovis and his successors reduced into writing; the Romans by the imperial law. The estates of the one were beneficiary and temporary; those of the others were held *pleno jure* and perpetual, and now, or soon after, began to be called *allodial*. But these allodial estates were not peculiar in after times to the Romans; for as these estates were alienable, many of them were purchased by the Franks: So that we read, that when Sunigisila and Gallamo were deprived of the benefices they held as Franks, they were permitted to hold their estates in propriety. As the Romans were, before their submission, divided into three classes, the nobles, the freemen, and the slaves, so they continued thus divided; the nobles being dignified with the title of *convivæ regis**.

But as it was unsafe to trust the government of these new subjects in the hands of one of their nation, the king appointed annually one of his companions, or *comites*, for that purpose, in a certain district; and this was the origin of counties, and counts. The business of these lords was to take care of, and account for the profits of the king's demesns, to administer justice, and account for the profits of the courts; which were very considerable, as the Roman laws about crimes being, by degrees, superseded, and consequently capital punishment in most cases abolished, all offences became fineable, a

*Montesquieu, l'Esprit des loix, liv. 30. chap. 13. Du Cange, voc. Alod. Schilteri Thesaur. voc. Alod.

third of which they retained to themselves. They also, in imitation of the lords of the Franks, led their followers to the wars. For every free Roman, that held four manors, was obliged to serve under his count; and those that had more or less contributed in proportion. This military duty, together with an obligation of furnishing the king with carriages and waggons, was all the burden put upon them, instead of those heavy taxes and imposts they had paid to their emperors; so that, in this instance, their situation was much mended, though in other respects it was sufficiently mortifying*. The greatest among them was no member of the political body, and incapable of the lowest office in the state; and as all offences were now fineable, those committed against a Frank, or other Barbarian, were estimated at double to the compensation of those committed against a Roman or Gaul. No wonder, then, that *gentilis homo*, a term formerly of reproach among the Romans, (for it signified a heathen and barbarian) became now a name of honor, and a mark of nobility; and that the Romans earnestly longed to turn their allodial estates into benefices, and to quit their own law for the Salic. And when once they had obtained that privilege, the Roman law insensibly disappeared, in the territories of the Franks, the northern parts of modern France, which are still called the *païs des coutumes*; whereas, in the southern parts, where no such odious distinctions were made by the original conqueror, the Roman law kept its ground, and is to this day almost entirely observed. These countries

*Heinnec. Elem. jur. Germ. lib. 3. § 26. Selden's tit. of hon. part 2. chap. 1. Spelman, voc. comites.

are called by the French lawyers the *païs de loi écrite*, meaning the Roman†.

But we cannot have a complete idea of the constitution of this nation, without taking notice of the clergy, who now made a considerable figure among them. Churchmen had, ever since the conversion of Constantine, been of great consequence in the empire; but the influence they obtained among the northern barbarians was much more extensive than what they had in the Roman empire. The conversion of Clovis to the Christian religion was owing to the earnest persuasions of his wife Clotildis, a zealous Christian, and to a vow he made when pressed in battle, of embracing the faith of Jesus Christ if he obtained the victory. He and his people in general accordingly turned Christians; and the respect and superstitious regard they had in former times paid to their pagan priests, were now transferred to their new instructors. The principal therefore, of them, were admitted members of their general assemblies; where their advice and votes had the greatest weight, as well as in the court of the prince; as learning, or even an ability to read, was a matter of astonishment to such an illiterate people, and it was natural in such a state they should take those in a great measure, as guides in their temporal affairs, whom they looked on as their conductors to eternal happiness. As they were the only Romans (for the churchmen were all of that nation) that were admissible into honors, the most considerable of

†Ripuar. L. L. tit. de diversis interfectionibus, p. 160, 161. ap. Georgisch, corp. jur. Germ. Du Cange, voc. Faida.

their countrymen were fond of entering into this profession, and added a new weight to it. But if the sacredness of their function gave them great influence, their wealth and riches added not a little to it. Before the irruptions of the barbarians, they had received large possessions from the bounty of the Roman emperors, and the piety of particulars. These they were sure to possess: but their subsequent acquisitions were much greater. Though these kings and their people had imbibed the faith of Christ, they were little disposed to follow its moral precepts. Montesquieu observes the Franks bore with their kings of the first race, who were a set of brutal murderers, because these Franks were murderers themselves. They were not ignorant of the deformity of their crimes, but, instead of amending their lives, they chose rather to make atonement for their offences, by largesses to their clergy. Hence the more wicked the people, the more that order increased in wealth and power*.

But, to do justice to the clergy of that age, there was another cause of their aggrandizement, that was more to their honor. As these barbarians were constantly at war, and reduced their unhappy captives to a state of slavery, and often had many more than they knew what to do with, it was usual for the churchmen to redeem them. These, then, became their servants, and tenants, where they met not only with a more easy servitude, but were, from the sacredness of the church, both for themselves and their

*Bacon's Discourse on the Laws and Government of England, p. 11....27. Monast. Anglicam. passim. Mezeray, abr. chronol. tom. 1. p. 172.

posterity, secured from any future dangers of the same kind. It was usual also for the unhappy Romans, who were possessed of allodial estates, and saw themselves in danger, by these perpetual wars, of not only losing them, but their liberty also, to make over their estates to the church, and become its socage-tenants, on stipulated terms, in order to enjoy the immunities thereof.

By all these means the landed estates of the clergy grew so great, that in time the military power of the kingdom was much enfeebled: for though they were obliged to furnish men for the wars, according as the lands they held were liable to that service, this was performed with such backwardness and insufficiency, that the state at one time was near overturned, and it became necessary to provide a remedy. Charles Martel, therefore, after having delivered the nation from the imminent danger of the Saracen invasion, found himself strong enough to attempt it. He stripped the clergy of almost all their possessions, and, turning them into strict military tenures, divided them among the companions of his victories; and the clergy, instead of lands, were henceforth supported by tithes, which before, though sometimes in use, were only voluntary donations, or the custom of particular places not established by law*.

In my next lecture I shall consider the introduction of estates for life into the feudal system, and take notice of the consequences that followed from thence.

*Montesquieu, l'Esprit des loix, liv. 30. chap. 21. liv. 31. chap. 9, 10, 11.

LECTURE VI.

The introduction of estates for life into the feudal system.... The nature and forms of investiture....The oath of fealty, and the obligations of lord and tenant.

IN the preceding lecture I took notice of the different condition and situation of the Romans and barbarians in the infancy of the French monarchy; but it will be necessary to observe, that all the barbarians themselves were not subject to the same laws and regulations. When the Ripuarian Franks, after the murder of their sovereign, submitted to Clovis, it was under an express condition of preserving their own usages. The same privilege he allowed to the Allemans, whom he conquered, and to such parts of the Burgundian and Gothic kingdoms as he reduced to his obedience. The customs of all these several people, as they were Germans, were indeed of the same spirit, and did pretty much agree; but in particular points, and especially as to the administration of justice, they had many variations; and these the several nations were fond of and studious of preserving. What was peculiar to these people, above all other nations, was this, that these different laws were not local, but personal: for although the Salians, in general, dwelt in one part of the country, the Ripuarians in another, the Allemans in a third, &c. yet the laws were not confined to these districts: but a Sali-

an, in the Ripuarian territories, was still judged by his own, the Salian law; and the same was true of all the others. Another peculiarity was, that the barbarians were not confined to live in the law they were born under. The Romans, indeed, could not pass from their Roman law to that of any one of their conquerors, until they were allowed, several ages after, to acquire fiefs; but any of the barbarians, if he liked another law better than his own, could adopt it: a privilege, I presume, derived from that ancient practice which they used, of removing from one state or commonwealth to another, or of going forth to form a new one.

In the French monarchy, then, there were five different nations, besides the Romans, governed by five distinct laws; but these five people, being all of the same northern original, and descended from the conquerors of Gaul, were, in the state, every one of them esteemed and regarded on an equal footing, enjoyed the same privileges, and equally received benefices from the king or other lords. I have already observed, that the bonds between the king and his companions in Germany continued during their joint lives. It had the same duration after they settled in Gaul; where they either presided with him in his court, as they had done formerly, or were settled in benefices near him, and in such situations as they might readily attend him on occasion; or else were the governors and leaders of the free Romans, under the title of counts. But all the grants of lands or offices that they enjoyed were, as yet, but temporary. So that they were *fideles*, or vassals, bound by an oath of fealty for life; but there were no fiefs, or

feudal tenures, if we may call them by that name, that continued for so long a term*.

The introduction of beneficiary grants for life, as is very properly conjectured, was first owing to the counts. They had, as I mentioned before, the third part of the profits of the courts in their respective districts, which made their office not only considerable and honorable, but opulent. They lived apart from the other barbarians among the Romans, whose allodial property was fixed and permanent. It was natural for them to wish the continuance of their lucrative employments, and to make them as perpetual as their obligation of fidelity was; and this they were enabled to attain by the means of the profits they made of their places, and the want of treasure, which the kings frequently labored under to support their wars: for offensive ones they could carry on in no other manner than by ready treasure. The counts, therefore, by the dint of presents, or fines, attained, or I may rather say, purchased estates for life in their offices; but these estates had, at first, continuance only during the joint lives of the granter and grantee†.

But the matter did not stop here. The example was quickly followed by the other barbarians, who were the immediate tenants of the crown, and who now were growing weary of the constant, or even a frequent change of habitation. And, in one respect, this allowance was of considerable advantage to the

*Lib. 1. Feud. tit. 1. Hanneton, de jur. feud. p. 139. Du Cange, voc. Fideles et Fidelitas.

†Mably, Observations sur l'histoire de France, liv. 1. chap. 6. Du Cange voc. Beneficium.

king, as it created a tie upon them, equally durable with that by which his companions were bound to him, and wore out by degrees that principle they had before retained, that by throwing up what they held from him, they were absolved from their allegiance. They, therefore, as well as the companions, took the oath of fealty; which, as far as I can find, was taken by none on the continent, whose estates were less than for life; though, in the law of England, it is a maxim, that fealty is incident to every tenure but two, namely, estates at will (for they did not think it reasonable that a person should bind himself by oath, in consideration of what might be taken from him the next day) and estates given in frank-almoigne, or free alms, that is, to religious houses, in consideration of saying divine service, and praying for the donor and his heirs; and these were excused out of respect to the churchmen, who were supposed not to need the bond of an oath, to perform that duty to which they had dedicated themselves, and also because the service was not done to the lord, who gave the land, but to God.

Thus estates for life, created by particular grants, went on continually increasing in number, till the year 600, by which time almost every military tenure, castle-guard excepted, was of this nature. And this accounts for the particular regard the feudal, and from it our laws shew to the tenant of the freehold, and the preference given to him above a tenant for years. For, first, his estate was, generally, more valuable and permanent, as long terms were then unknown; and, secondly, it was more honorable, as it was a proof of military tenure, and of the descent

of its possesor from the old German freemen. For it was a long time after, that socage lands, in imitation of these, came to be granted in the same manner, for life. The lords, or immediate tenants of the crown, having, by the means afore-mentioned, gotten estates of continuance, and being bound for life to the king, thought it their interest likewise to connect their tenants as strictly to them, by granting them freeholds also; but in the oath of these sub-vassals, which they took to their lords, there was an exception of the fealty due to the king, from whom the land was originally derived, or of a former lord, if such an one they had, to whom they were bound by oath before. These sub-vassals, likewise, had not in those early times, the power of creating vassalages, or estates for life, under them; for it was thought improper to remove the dependance of any military man on the king to so great a distance; and indeed it was hardly worth any man's while, if it had been lawful, to accept such a gift as was determinable either on the death of the superior lord, or of his vassal, who had granted it, or lastly, on his own death*.

Estates for life being now become common, and in high estimation, it was thought proper that they should be conferred with more form and solemnity, and that by means of what the feudal law calls Investiture, of which there are two kinds. The first, or proper investiture, was thus given: The lord, or one impowered by him, and he that was to be tenant, went upon the land, and then the tenant, having taken

*Spelman's Gloss. voc. Feodiem. Dalrymple on Feudal-Property. chap. 1. Hume, Append. 2.

his oath of fealty, the lord, or his deputy (or attorney, as our law calls him) gave actual possesion to him, by putting into his hand a part of the premises, in the name of the whole, as a turf, a twig, or a hasp of the door, in the presence of the *pares curiæ*, that is, of the other vassals or tenants of the lord. This is what our law calls giving livery and seizin, from the lord's or his deputy's delivering, and the tenant's taking seizin, for so the possession of a freehold or estate for life is called....The presence of the *pares curiæ* was required equally for the advantage of the lord, of the tenant, and of themselves; of the lord, that if the tenant was a secret enemy, or otherwise unqualified, he might be apprised thereof by the peers of his court, before he admitted him; and that they might be witnesses of the obligation the tenant had laid himself under of doing service, and of the conditions annexed to the gift, if any there were, which the law did not imply: for the benefit of the tenant, that they might testify the grant of the lord, and for what services it was given; and lastly, for their own advantage, that they might know what the land was, that it was open for the lord to give, and not the property of any of the vassals; and also that no improper person should be admitted a par, or peer of their court, and consequently be a witness, or judge, in their causes*.

Hence it is, that in our law, if a man has a right to enter into several lands in the same county, an entry into one of them, in the name of all, is sufficient to vest the seizin, that is, the possession of the free-

*Du Cange, voc. Investitura. Spelman, voc. Pares Curiæ. Craig de feud. lib. 2. dieg. 2.

hold of all, in him; because the same *pares curiæ* (who in ancient times were the only witnesses allowed) who knew he had in their presence entered into one, know also that he entered that one in the name of all the others; but if the lands lie in different counties (which are distinct jurisdictions, and have different *pares curiæ*) an entry into one county, in the name of the whole, is not sufficient; because, as to seizin of lands in the other county, the *pares* thereof are the only competent witnesses.

As the proper investiture required the actual going upon the lands, which was often inconvenient, the improper investiture was introduced. This, which was the second kind mentioned, was also performed in the presence of the *pares curiæ*, thus: The intended tenant, in a most humble and lowly manner, prays the grant of such an estate from his lord; which, when the latter has agreed to, he invests him, by words signifying his grant, and what it is of, accompanied by some corporeal action, as delivering him a staff, a ring, a sword, or clothing him with a robe, which last, being the most common method amongst the great immediate tenants of the king, gave rise to the name *investiture*. After this, the tenant did fealty. But this improper investiture did not transfer the actual possession of the land without subsequent livery and seizin, and gave the tenant not a right to enter, but only a right of action, whereby he might sue, and oblige the lord to transfer it by an actual livery. For all these lands, being liable to services arising out of the profits for which the lord was bound to answer to the king, his possession of these profits by their rules was continued, until he

had, by an act of public notoriety, namely, by giving livery and seizin on the land, put it out of him.... And this maxim was, I apprehend, established also for the benefit of the co-vassals, who could better judge by their own eyes, on the spot, whether an injury was done by the grant to any of them, than by hearing the lands named and described elsewhere, as, in such case, it frequently happened that all the vassals were not present*.

Hence, if the lord had granted lands by an improper investiture to A, and had afterwards, by livery and seizin, granted them to B, they became B's, though he was the later invested; and the remedy A had against the lord was not for the lands themselves, for those he had already legally parted with to B, and could not recal, but for their value, in consideration of his having bound himself to fealty.

This was the form and manner of proper and improper investitures in the early times, before these barbarians had learned the use of letters, and was intended not merely for solemnity, but also to create such a notoriety of the fact, as it might easily be proved by *viva voce* testimony. For if it was denied, the tenant produced two or more of the *pares curiæ*, each of whom swore he had either been present at the investiture himself, or had constantly heard his father declare, that he was. And this, at first, was the only evidence admissible, and was abundantly sufficient when the grants were only for one life.... Such proof, however, could not be of any advantage to the church; for though churchmen die, the

*Bracton, lib. 2. cap. 17. Spelman, voc. Fidelitas, et Seisina. Fleta, lib. 3. cap. 15.

church doth not, but continues to be represented in a succession of natural persons. If she, therefore, had not a more permanent evidence to produce than what I have before-mentioned, she could never, after some length of time, ascertain her rights. On this account *brevia testata*, or, as we call them, deeds, were made use of, which were written instruments, expressing the grant, and its nature, attested by some of the *pares*, and authenticated by the seal of the lord, or by his name and sign of the cross. When this kind of evidence was once introduced, as it was more fixed and certain than the frail memories of men, it became customary for the tenant, who had been invested either properly or improperly, to demand and obtain a *breve testatum* of that investiture, and afterwards other symbols in improper investitures went out of use, and the delivery of a deed became the ordinary sign; but this, as all other improper investitures, required a subsequent actual livery and seizin.

Having thus delivered the ancient and proper method of constituting an estate for life, let us attend to the consequences, and see what were the several rights and obligations of the lord and tenant, and for that purpose examine the oath of fealty.

The general oath of fealty on the continent was thus: *Ego N. vassallus, super hæc sancta Dei evangelia, juro, quod ab hac horâ in antea usque ad ultimum vitæ meæ diem, tibi M. domino meo, fidelis ero, contra omnem hominem, excepto summo pontifice, vel imperatore, vel rege, vel priore domino meo*, as the case was. In England, Littleton gives this account of it. When a freeholder doth fealty to his lord, he shall hold his

right hand on a book, and shall say: KNOW ye this, my lord, that I shall be faithful and true unto you, and faith to you shall bear, for the lands which I claim to hold of you; and that I shall lawfully do to you the customs and services which I ought to do, at the terms assigned; so help me God, and his saints; and he shall kiss the book*.

The only differences are, that the words *ab hac hora in antea usque ad ultimum vitæ meæ diem* are omitted: for abroad none but tenants for life swore fealty. In England termers for years did; and that *contra omnem hominem, excepto, &c.* though implied, is likewise omitted; which exceptions, however, in the English law, were inserted in the doing of homage which the tenant in fee did to his lord.

Such was the general oath of fealty; but to shew what *being faithful and true*, and *bearing faith* comprehends, it will be proper to insert, from the seventh title of the second book of the feudal law, the larger oath, which persons, rude and ignorant of what the word fealty implied, were to take. It runs in these words: *Ego juro, quod nunquam scienter ero in consilio, vel in facto quod tu amittas vitam, vel membrum aliquod, vel quod tu recipias in personâ aliquam læsionem, vel injuriam, vel contumeliam, vel quod tu amittas aliquem honorem quem nunc habes, vel in antea habebis; & si scivero, vel audivero, aliquo, qui velit aliquod istorum contra te facere, pro posse meo, ut non fiat impedimentum præstabo. Et si impedimentum præstare nequivero, quam cito potero, tibi nunciabo;*

*Spelman, Gloss. p. 266. Feud. lib. 2. tit. 6. Littleton, lib. 2. chap. 2. Basnage, coutume reformée de Normandie, tit. Des fiefs et droits Feodaux, art. 107.

& contra eum, prout potero, auxilium meum tibi præstabo ; & si contigerit, te rem aliquam quam habes vel habebis injuste vel fortuito casu amittere, eam recuperare juvabo, & recuperatum omni tempore retinere. Et si scivero te velle juste aliquem . offendere, & inde generaliter vel specialiter fuero requisitus, meum tibi sicut potero, præstabo auxilium. Et si aliquid mihi de secreto manifestaveris, illud, sine tua licentia, nemini pandam vel per quod pandatur faciam ; & si consilium mihi super aliquo facto postulaveris, illud tibi dabo consilium, quod mihi videtur magis expedire tibi ; & nunquam ex persona mea aliquid faciam scienter, quod pertineat ad tuam vel tuorum injuriam vel contumeliam.

Besides the negative obligations, of doing nothing to the prejudice of the lord or his family, the positive ones the vassals lay under may be reduced to the two heads of counsel and aid ; which, with us, are still the principal duties that the parliament, who are, or represent the vassals of the king, owe to the sovereign. Under counsel, not only giving faithful advice, but keeping his secrets was included. Aid may be either in supporting his reputation and dignity, or defending his person or property. Under the first, the vassal was not only to shew him the highest reverence, but was forbid to accuse or inform against him, except in the case of treason, where the supreme lord was concerned. He could not in a suit between them tender to his lord the oath of calumny, whereby he should be obliged to swear he thought his cause was just, and that he did not carry it on with an intent to harass and distress ; for this was throwing an aspersion on his lord's character. He

could not, for the same reason, bring any action against him, whereby he might be defamed, and particularly the interdictum *unde-vi*, which was a charge against the person sued, of an unjust and violent dispossession of property. Neither could he, in any cause that was not strictly feudal (for in such as were for the general preservation of that polity, he was permitted) bear witness against him. And, lastly, he was obliged to support his dignity, to attend his courts, and do suit and service, as a witness and a juror.

By aid to his person, he was not only obliged to defend his lord, if attacked personally, but to assist him in his wars, and that at his own expence, out of the profits of his tenancy; and if, in the field of battle, he deserted his lord, before his lord was mortally wounded, it was an absolute forfeiture. But this aid he was not obliged to give until required; for perhaps the lord did not need the aid of all his tenants; and the vassal, without notice, was supposed ignorant that there was any occasion for his assistance, unless it could be proved that the vassal knew his lord's danger, when the lord himself did not; or that he knew it was so imminent as not to give the lord time to summon him; in which two cases, he was obliged to serve without requisition*.

But here some distinctions must be taken notice of as to the nature of these wars. I have often repeated that the king's companions were bound to assist him in all his undertakings, offensive or defensive; and that the other freemen were obliged only to

*Coke on Littleton, book 2. chap. 1. Du Cange, voc. Vassaticum. Wright on tenures, p. 55, 56.

serve in defensive wars. But now, by this new introduction of grants for life to the freemen, the case was altered. In all defensive wars, they were obliged to aid their lord, though he had been the unjust aggressor, and this for the preservation of the society to which they belonged; but in offensive ones, it was to be considered whether the cause was just, or doubtful, or notoriously unjust. In the two first cases, he was obliged to furnish his aid; for if his lord's quarrel was doubtful, the respect and reverence he owed him, and his regard to his lord's character and dignity, laid him under a necessity of presuming in his superior's favor. But if the war was notoriously unjust, he was at liberty to serve, or not, as he pleased. And the aid he was bound to give, where he was bound, was against all persons, *contra omnem hominem*, even his parents, brothers, children, and friends, with the following exceptions. First, not against the king, who was the supreme lord of the whole, and in whose preservation and dignity every individual was concerned. Secondly, not against himself, for self-preservation is the first law of nature. Thirdly, not against his original country, though he had received a grant from a foreign lord, and afterwards war broke out between them: for by this time, the opinion of a durable obligation to the state he was born in, began to prevail among them.... Lastly, not against his ancienter lord, when he had grants from two; for the second obligation could not annul the first. It may here be naturally asked, how such a vassal, who had two lords, was to act in case of a war between them? If his first lord's cause was just or doubtful, he was undoubtedly bound to him a-

gainst the subsequent one, even in attacking him; and this was no forfeiture, for the second lord had sufficient notice of his prior obligation, by the exception in the oath of fealty. Indeed, if he, having a lord before, had omitted the exception, he justly lost his fief, for the deceit put on his latter lord. But if his first lord's cause was notoriously unjust, he was not at liberty to assist him against the second; but by the two bonds was obliged to remain neuter*.

This military duty was to be done in the vassal's proper person, if he was capable of it; unless the lord was pleased to accept of a deputy. But if he was incapable himself, as often must have happened, after estates for life came in, he was allowed to serve by a substitute, such as the lord approved. Suppose, then, a man had two lords, who were at the same time at war with others, and each required his personal assistance, it was plain he was obliged to serve both, the elder lord in person, because his right was prior, and the last by deputy†.

The aids due to the lord, in respect of his property, were, first, to aid and support him, if reduced to actual indigence, and to procure his liberty, by paying his ransom, if taken in war. It was a doubt among the feudal lawyers, whether, if the lord was imprisoned for debts, his tenants were obliged to release him; and the better opinion was, that they were, if the debts did not tend to their very great impoverishment‡.

*Feud. lib. 2. tit. 23. and 24. Dalrymple on Feud. property, chap. 2. Wright on tenures, p. 72.

†Madox, Antiquities of the Exchequer, vol. 1. p. 653.... Coke on Littleton, lib. 2. chap. 3.

‡Du Cange, voc. Auxilium. Madox, Antiq. Excheq. c. 15.

These were all the aids necessarily required by the law in these ancient times. For those for making his eldest son a knight, and marrying his elder daughter, came in afterwards. All other contributions and assistances were merely voluntary, though very frequent, and were originally, as they are still here, and are still called abroad, though imposed really and truly, *free gifts*.

We are now to speak of the duty of the lord to his vassals; and on this head there is no need of enlarging much: for it was a maxim in the feudal law, that though the vassal only took the oath to the lord, and the lord, on account of his dignity, and the respect due to him from the tenant, took none; yet was he equally obliged as if he had taken it, to do every thing, and forbear every thing, with respect to his tenant, that the vassal was with respect to the lord; so that the bond was in most respects strictly mutual; but not in all, for the lord was not obliged to support his indigent tenant, or to give aids to him; but on the other hand, he was obliged to warrant and defend the lands he had given to his tenant by arms, if attacked in open war, and in courts of justice, by appearing upon his voucher, that is, the tenant's calling him in to defend his right, and if the lord failed, he was bound to give lands of equal value, or, if he had not such to bestow, to pay to the tenant (in consideration of the bond for life, he had bound himself to his lord in) an equivalent in money.

As, in the case of the vassal's failure in his duty, the lands returned to the lord, so, in case of the lord's failure on his side, the lands were vested in the vassal, free from all services to his immediate superior.

But to the king, or lord paramount, he still owed service, in proportion to his fief; and by this means he might become, instead of a sub-vassal, an immediate vassal of the king*.

Having mentioned the obligations on each side between lord and tenant, it next follows to see what interest each had in the lands given; on which head I shall be brief, as these several rights were not so nicely distinguished as in after ages, when these tenures became hereditary. The lord was then to suffer his tenants to enjoy the issues and profits of the lands, he rendering the services due by the reservation of law, and the additional ones, if any such had been specially reserved. In case of failure, he had, in those ancient times, a right of entry for the tenant's forfeiture. For while this military system continued in its full vigour, the smallest breach the vassal committed in his engagements was an absolute forfeiture; but in after times, when the lands were often given upon other considerations than military service; and when the military was often commuted for pecuniary considerations, a milder way was found out, that is, by *distress*, by which the lord, instead of seizing the lands, took possession of all the goods and chattels of his tenants found upon the lands, (for the lands were still the mark where he was to take) and kept them as a deposit, till his tenant had made satisfaction, originally indeed at the lord's pleasure, for the failure in his duty†.

*Feud. lib. 2. tit. 25.

†Bracton, lib. 3. p. 130. Spelm. voc. Escheata. Glanville, lib. 7. cap. 17. Dalrymple on feudal property, p. 62,

The right the tenant had in the land was, that, paying the services due, he should receive the produce thereof, and turn it to his own best advantage; and that he might, if attacked in a court of justice, vouch, or call in his lord to defend his possession by arms, or otherwise. But as his tenure was precarious, and only for life, he was prohibited from doing any thing that should either hurt his lord's interest, or that of the king, in whom and his successors the inheritance was vested. Thus, he could not commit waste, by destroying houses, or cutting down trees, except what was necessary for immediate use, for repairs, firing, or tillage. He could not bequeath his tenancy, for he held only during life. He could not alienate without the consent of his lord, for he had his lands in consideration of his personal service; and although, in case of necessity, he was allowed a substitute, it was only such an one as was acceptable to the lord; whereas by alienation, the real tenant who was bound by oath to do the services out of the profits, was to lose them, and a stranger, perhaps an enemy, who was under no tie to the lord, was to enjoy them. Alienation, therefore, without the consent of the lord, was unlawful. If he consented indeed, and accepted the alienée, he, upon his taking the oath of fealty, became the real tenant, and the former was quit of all positive service, except honor and reverence; but still bound by his former oath from doing or suffering any thing to the prejudice of his former lord. Neither could a sub-vassal, in those early times, create a vassalage to be held of himself. The immediate vassal

Ed. 1757. Hengham Parva, chap. 6. Coke on Littleton, b. 1. chap. 1.

of the king, indeed, could, but then it was on these terms; first, that the person he granted it to was one that was of the ligeance of the king, either natural or adopted; next, that he was as capable of rendering the services as the grantor; and lastly, that the services reserved should, if not better, which was expected, be at least equally beneficial to the supreme lord as those of the original grant to the intermediate or mesne lord. To explain this, if the king granted ten thousand acres to his immediate vassal, for the service of ten knights, the vassal might give one thousand, indeed, or any lesser number of acres to one person, for the service of one knight; but if he gave more to one, as he had attempted to hurt and lessen the benefit his superior had stipulated for, his grant was void, and in those times, when forfeitures were regularly exacted, the grant of the king to him was forfeited also*.

In my next lecture I shall say something of *improper feuds*, as they began to be introduced about the time I am now upon, and were very seldom, in those ages, granted for longer terms than for years or lives, and go on to shew by what means, by what steps and degrees, estates for life grew up into inheritances.

*Craig, de feud. lib. 2. dieg. 207.

LECTURE VII.

Improper feuds or benefices....Grants to the Church....Grants in which the oath of fealty was remitted....Grants to which a condition was annexed, that enlarged or diminished the estate....Grants which reserved certain other services, beside military service....Grants implying some certain service, as rent, and not reserving military service....Grants reserving no services, but general fealty....Grand serjeanty....Petty serjeanty....Grants to women....Grants of things not corporeal....Feudum de Cavena....Feudum de Camera.

HAVING, in the preceding lecture, laid down the manner of constituting a proper beneficiary estate for life, which consisted in lands granted for the defence of the state, upon the consideration of personal military service, and the rights and obligations annexed thereto; it will be proper to mention such, (and to point out the several kinds of them) as are called improper benefices, which are those that, in one or more particulars, recede from the strict, and, in ancient times, the usual nature of those grants; and this is more especially necessary, as, since the abolishing the military tenures in Charles the Second's time, all our present estates come under one or other of these heads. It was a maxim in the feudal law, that *conventio modum dat donationi;* and therefore, whatever terms the donor prescribed, though varying from the general course, was the rule by which the grant was to be regulated.

In the first place, then, all benefices granted to the church were improper ones, because given on other terms than that of military service, and because they ended not with the death of the grantor or grantee, but continued coeval with the life of the church, that is, forever*.

Secondly, Grants of lands, wherein the oath of fealty was remitted; for though fealty itself was an incident, essential to, and inseparable from, every estate of life abroad, and every estate of years also in England, the ceremony of actually taking the oath might be omitted; and if the lord had put the tenant in possession, without his having taken the oath, the tenant might enjoy without it. He was obliged, indeed, to take it whenever his lord called upon him, on pain of forfeiture; unless, in the investiture, it had been expressly remitted; in which case, he might refuse to take it, and justify his refusal by the tenor of his investiture†.

Thirdly, All grants to which there was a condition annexed, that either enlarged or diminished the estate; as if lands were granted to two, and the survivor of them. This was an improper benefice, as it had continuance for more than one life; or if they were granted to a man for life, provided he did, or refrained from doing such an act. This was improper also, because it might have a more speedy determination.

Fourthly, All grants, in which certain services beside military were reserved, were also of this nature, as if the tenure was by military service and a certain rent, or any other certain duty, or by military ser-

*Craig, de feud. lib. 1. dieg. 11 and 12. †Ibid.

vice reduced to a certainty, as to attend, suppose forty days and no more, or by military service with a power in the tenant to excuse himself by paying a certain sum. For the proper fief was for military service only, the occasions and duration of which were uncertain*.

Fifthly, If military service was not reserved at all, but some other certain service instead thereof, as rent, the grant was an improper one, and such are our tenures, since they have been reduced to socage, which is derived from *soke* or *soka*, a plough, because their duty was originally to attend a certain number of days to plow their lord's grounds, or else to supply him with a certain quantity of corn in lieu thereof. This manner of paying in kind, namely, by corn, cattle or other necessaries, was continued every where many ages; in England, until the time of Henry the First, when they began to be commuted into money, to the great advantage of the successors of these socage tenants, whose estates were before become hereditary. For the computation being made at the rate and proportion of value between money and the necessaries of life at that time, as money grew more plentiful every day, its value continually sunk, and the price of commodities accordingly increased; in so much that the present successor of a tenant at that time, who had paid a fat ox, which was changed into twenty shillings, its then value, would now pay but the eighth part of the original reservation, when the price of an ox is eight pounds. And this contributed not a little to the happy equality which now reigns among all ranks, as these baser,

*Ibid.

the socage tenures, were continually rising in value, and consequently in consideration, and coming every day nearer to an equality, in the estimation of the world, with the nobler, the military benefices†.

Sixthly, If no services at all were reserved, except general fealty, which could not be remitted; for it was thought reasonable, not only to grant lands in consideration of future military service, but also to reward such as had deserved eminently, and were perhaps maimed or mutilated, and so unfit for future service, with lands free from such, or any other duty.

Seventhly, Grand sergeanty is a benefice of an improper nature, even though it be reckoned a military one, because it is reduced to a certainty. Grand sergeanty is a certain service done by the body of a man to the person of the king, and is of two kinds; military, which is to be done either in or out of the realm; and not military, which is to be done within the realm. Military, as when lands are given on condition of carrying the banner of the king, or his lance, or to lead his army, that is, to be his constable; or to number and array his army, that is, to be his marshal; but these being *certain* services, and due to the person of the king, they were not obliged to attend, but where he went in person; and this right they insisted on so strongly, as had almost occasioned a rebellion in the time of Edward the First; who, although in most things an excellent prince, was of an hot and haughty temper‡.

†Reliq. Spelm. p. 3, 7, 33, 43. Gervas. de Tilb. Dialog. de Scaccar. lib. 1. cap. 7. Madox, Antiq. Exchec. vol. 1. p. 272.

‡Fortesque de laud. leg. Angl. p. 99. Ed. 1737. Coke on Littleton, b. 2. chap. 7.

Having determined to attack France on two sides; in Flanders, where he intended to command himself, and in Guienne; he ordered the Earl of Hereford, high constable by tenure, and the Earl of Norfolk, marshall by tenure, to lead the army in Guienne, as his generals and commanders in chief. But, however honorable and pleasing in other respects the offer might be, they feared that such a precedent, quietly complied with, might be, in after times, a means of introducing new and hard services at the king's pleasure, instead of the ancient and known ones.... They, therefore, flatly refused, unless he went thither himself; offering, at the same time, to serve under him in Flanders. The king, boiling with resentment against France, and provoked at this contradiction to his pleasure, however justly founded, threatened Norfolk, in a transport of passion, with hanging; to which the other replied, with equal fierceness, and a total want of respect. The two Earls retired to their estates, put themselves in a state of defence, and even committed several outrages against the king's collectors; and their cause was generally espoused by the nation, who were against the king's exacting any new and unheard-of services. The behavior of these lords to their sovereign, and to such a sovereign, in setting him at defiance, and that with terms of disdain, when they themselves were the aggressors, was utterly unjustifiable; but, from their cause, notwithstanding this behavior of theirs, being universally espoused by the nation, we may clearly see the opinion and judgment of those times; that their kings were not unlimited, and that they had no right to exact from their vassals any services but

those that flowed from their tenures. The king indeed, first gave their lands and offices to others; but when he had cooled, and found they had insisted on no more than was their right, he, in the frankest manner, repaired his error. He gave in parliament a new confirmation of Magna Charta. By another statute, he renounced all right of taking talliages, that is, levying taxes, even on his own demesnes, without consent of parliament, as contrary to that charter; and in the body of this last act, in the amplest manner, remitted all disgust and resentment against the two earls and their associates; and gave them the fullest indemnity for the offences they had so outrageously committed. Such conduct in any king whose subjects were not disposed to esteem him, might have been as a sign of weakness, and have been attended with dismal consequences; but in Edward's realms there was not a man that did not admire his wisdom, adore him for his valor, his honor, and his sincerity. He could encroach without incurring hatred, and he could retract without being thought mean; so that it may be a question, whether, by the noble manner of his repairing his mistake, he did not tie his subjects to him with stronger bonds of affection, than if he had never committed it*.

The grand serjeanties that are not military are of various kinds, being offices and services done to the person of the king within the realm, in order to the support of his state and dignity; for which reason, although they are not, properly speaking, military services, yet they are looked upon in that light, and

*Carte, hist. of England, vol. 2. p. 169. The reign of Edward I. in Kennet's collect. of English historians, p. 197.

are endowed with the same privileges, and subject to the same regulations, except in a few instances, to be hereafter mentioned; so that no person under the rank of the lesser nobility, that is, of knighthood, was capable of performing them; and therefore, when, by allowing the alienation of lands, these tenures fell into the hands of persons of inferior quality, they were either knighted, or appointed a deputy of that rank. Thus, at the coronation of Richard the Second, as we find in Lord Coke, William Furnivall claimed to find a globe for the right hand of the king, and to support his hand on the day of his coronation, in virtue of the manor of Farnham, which he held by that grand sergeanty; but, though descended of a noble family, he was not permitted to perform it in person, until he had been dubbed a knight. At the same coronation, John Wiltshire, citizen of London, claimed to hold a towel while the king washed before dinner, which claim being allowed, as he was of too low rank to perform the service in person, he made Edmund Earl of Cambridge his deputy. Women likewise and minors were obliged to serve by deputy; as did, at that time, Anne Countess-dowager of Pembroke, by Sir John Blount, and her son John Earl of Pembroke, a minor, by Edmund Earl of March†.

These grand sergeanties, which were most of them lands granted for the doing certain duties at the solemnity of the coronation, contributing to the splendor and dignity of the crown, have been still retained, though all other military tenures have been chan-

†Coke on Littleton, lib. 2. chap. 8. Madox, Antiq. Exchequ. vol. 1. p. 321, 326.

ged into free and common socage. However, all these grand sergeanties were not for the bare purpose of attending at coronations. The lord high stewardship or seneschalship of England, of which the duty is to preside at the trials of peers, was annexed to the barony of Hinckly, which, passing into the family of Leicester, and then into that of Lancaster, in the person of Henry the Fourth was united to the crown; but ever since that time, as the powers and privileges the law threw into his hands were looked upon as too extensive, and dangerous, if continued, this officer hath only been occasionally created, as for a coronation, or the trial of a peer, which ended, he breaks his staff, and the office is vacant†. The same is the case, and for the same reason, of the office of high constable, ever since the attainder, in Henry the Eighth's time, of Edward Duke of Buckingham, who enjoyed it as Earl of Hereford. Thus did the crown get rid of two considerable checks, which concurring with other more extensive and influencing causes, helped to raise the power of the house of Tudor above what the princes of the line of Plantagenet had enjoyed‡. The office of earl marshal, indeed, still continues in the noble family of Norfolk. For, notwithstanding the attainders of that family, when they were restored, it also was restored to them. The reason is, because this office is of little power; indeed, in the vacancy of the constable to whom he is properly an assistant, scarce of any at all. It being, therefore, an honourable dignity, and attended with no danger, it is no wonder it hath re-

† Madox, hist. of Exchcq. vol. 1. p. 51.

‡ Ib. p. 40. 41.

mained‖. In this kingdom one grand sergeanty remained till the year 1715, in the family of Ormond, that of butlerage; but it differed from those beforementioned in this, that it was not a service arising from a grant of lands, but of the prisage of wines, an ancient profit of the crown, due by prerogative, viz. a right to take two tons of wine, one before the mast, and the other behind, out of every ship containing twenty tons or more, until Charles the Second purchased it from the Duke of Ormond by a perpetual pension of four thousand pounds a year§.

Eighthly, Petty sergeanty was another species of improper benefices, and, in our law, was comprised under the general head of *socage*, because the service was certain. It is, as Littleton† defines it, where a man holds his land of our sovereign lord the king, to yield to him yearly a bow or a sword, or a dagger, or a knife, or a lance, or a pair of gloves of mail, or a pair of gilt spurs, or an arrow, or divers arrows; or to yield such other small things belonging to war; so this, as well as grand sergeanty, was a tenure of the king's person, and could not be held of a subject. Such is the grant the Lord Baltimore hath in his province of Maryland; for he yields every Christmas five Indian arrows, besides a fifth of all gold and silver found within this province.

Ninthly, All grants to women were of the nature of improper ones, because they must always serve by

‖ Ib. p. 43.

§ It may not be improperly remarked in this place, that about the 18th year of Henry II. Geoffrey Martel held in England the office or sergeanty of Pincernaria, or butlership. See Madox, hist. Exchcq. vol. 1. p. 50.

† Lib. 2. cap. 9.

deputy; and personal service is essential to the proper military tenure‡. But these were not introduced so early.

The tenth kind, and the last that I shall mention, of improper benefices, are those that are of *things not corporeal*, and of which, consequently, there cannot be a possession manually delivered over, that is, they do not admit of livery and seizin, and therefore can be only conveyed by the improper investiture, that is, by words or writing, accompanied by a symbol. Such are rights in, or profits issuing out of land, where another hath the possession of it. As the feudal law distinguishes between corporeal things, whose possession can be actually transferred, and incorporeal, which cannot; so doth our law make what is the same distinction between things that lie in livery, and things that lie in grant. In the first, it regularly requires an actual livery and seizin, and here a deed is not absolutely necessary; but the second pass by the delivery of the deed. Here therefore a deed is absolutely necessary; for although the feudal law admits the use of other symbols in this case, ours, for the greater certainty, precisely requires this peculiar one, that there may be full evidence of what was conveyed. Of this last tenth kind as there are many and various species, I shall run over some of them in a cursory manner, to explain and show their general nature.

The first I shall take notice of is, that which, I presume, was the most ancient, as it seems to have come in the place of those repasts the king gave to his comites, or companions, and is what is called *feu-*

‡ Feud. lib. 1. tit. 8.

dum de cavena. *Cavena* signified the repository, or repositories of the necessaries of life, while in those ancient times the services due from the demesnes, or the socage lands, to the king or lords, were paid in kind. Things therefore necessary, or useful for the support of life, distributed in specie, out of the king's or lord's cellar or pantry, or both, were what the *feudum cavena* consisted in; and that this came in place of the ancient constant entertainments, and feasts, of the comites, or companions, appears from this, that it was a rule, even after other grants were allowed to be hereditary, that these determined with the life of the grantor, or grantee, which ever first happened to expire. These grants likewise were of two kinds; some granted in consideration of future services, upon the failure of which a forfeiture was incurred; others, in reward for past services, where nothing was expected for the future but general fealty. This difference runs through many other of these gifts that lie in grant. For the feudal law distinguishes them into *officiosa*, that is, to which a positive duty is annexed, and *non officiosa*, where no subsequent service is required, but general fidelity, which is incident to every tenure†.

The second I shall mention is *feudum de camera*, which, I apprehend, was originally a substitution for what I have just mentioned, the *feudum de cavena*; for it was instead of an allowance of necessaries out of the cellar or pantry of the king, an annual allocation of a sum of money for will, life, or years, according as it was granted out of the *camera*, or chamber where the king or lord kept his money; and this

† Brussel, usage des Fiefs, tom. 1. p. 41. Du Cange, voc. Cavena and Canava.

was, as the other I before mentioned into whose room it came, either a reward for past services, in which case no future duty was required, or on consideration of future ones. The pensions granted by the king in our kingdom (Ireland) out of his revenue, are of the nature of the former; and the salaries to judges and other officers are of the nature of the latter. What was common to both of these, the *feudum de camera & de cavena*, was, that by the feudal law, they were not due at the stated time, unless there were provisions in the *cavena*, or money in the *camera*, and that free from debts; for the lord's safety and dignity was to be first considered; but they were to wait for their arrear, till provisions or money came in.

Another thing is to be observed, that, although, at the introduction of these tenures, all others were for the life of the grantor and grantee at most, yet when the others became perpetual, these continued long after to be only for the joint lives of the grantor and grantee, namely, as long as kings and great lords were considered as tenants for life, and incapable of alienating their demesnes, or laying any permanent charge upon them. But when, by the frequency of the example of alienations, and by the occasional indigence of the kings and other lords, and the desire designing persons had to take advantage of it, alienations of the demesnes were once introduced, to the prejudice of the successor, these grants, as was very natural, as they were less hurtful than an absolute alienation, were continued for the life of the grantee, though the grantor had died before†.

†Spelman, and Du Cange, voc. Camera, et voc. Feudum. Craig, de Feud. lib. 1. Dieges. 10.

LECTURE VIII.

Feudum Soldatæ....Feudum habitationis....Feudum Guardiæ....Feudum Gastaldiæ....Feudum mercedis....Incorporeal beneficea in England....Advowsons....Presentative Advowsons....Collative Advowsons....Donatives.

IN the preceding lecture I began to treat of the several kinds of improper benefices, which are transferable only by the improper investiture, or, as the English law says, *lie in grant;* intending only to illustrate their general nature, without descending minutely into particulars; and of these, I have already mentioned the *feudum de camera*, and that *de cavena*. I call these fiefs, even at the time I am now treating of, in conformity with the practice of the feudal writers: not with strict propriety, indeed; for *feudum*, properly speaking, signifies a tenure of inheritance, and such were not yet introduced. But before I quit them, it will be proper to take notice of some sub-divisions of them, to be met with in the feudal writers.

I have already observed they were either gratuitous or officious, that is, without future service, or with it. Of the first kind there were two species; that called *feudum soldatæ*, from the word *solidus*. which signified a piece of money, and was a gratuitous pension, granted either out of the charity or bounty of the lord, or in reward of past services; the other called *feudum habitationis;* which is liberty of dwelling in an house belonging to the lord, in whom

the property still doth, and the possession is still supposed to remain*. Of the officious ones, Corvinus mentions three kinds, *feudum guardiæ*, *feudum gastaldiæ*, and *feudum mercedis*.

The *feudum guardiæ* hath annexed to it the defence of a castle, for the security of the realm; and this differs from the castle guard I have before mentioned, in as much as that, where lands were given for the defence of the castle, it was a corporeal benefice, and transferred by livery and seizin; namely, by admitting the constable into the castle, and delivering him the key thereof, and was an improper one only in respect of its duration, as in the early times, it continued only a year; but this I am now speaking of was a pension, paid out of the king's exchequer for the same purpose; and was of the same nature with the modern salaries of governors of garrisons†.

The *feudum gastaldiæ* was a pension granted to a person for transacting the lord's business, as for being his treasurer, steward, agent, or receiver. The *feudum mercedis* was in consideration of being an advocate or defender of the lord. Such are grants to lawyers *pro consilio impendendo*; and the salaries of the king's lawyers, and the solicitors for the crown‡.

I shall next run over briefly the several kinds of incorporeal benefices which the law of England takes notice of, and explain their general nature. And the first I shall take notice of is an *advowson*, which is a right a man hath of nominating a proper person to fulfil the duties, and to receive the profits of an ec-

* Du Cange, voc. Soldata, et voc. Feudum ædificii.

† Coke on Littleton, lib. 2. chap. 4.

‡ Du Cange, voc. Gastaldus.

clesiastical benefice. These rights arose thus: In the infancy of the Christian church, when the clergy were supported by the voluntary contributions of the people, the bishop was chosen by the clergy and people at large; and this method was so firmly established, that when the emperors became christians, although they made great donations of lands to the church, yet they left the manner of election as they found it; and so it continued in Rome until the year 1000 at least. But these elections, made by the giddy multitude, were the occasions of infinite disorders. The value of these offices being increased, and the manners of the ecclesiastics corrupted by the accession of riches; parties and factions were eternally forming, and supported by all methods; and when a vacancy happened, the contest was frequently not decided without bloodshed. It is no wonder that all the sober part of the clergy, who were scandalized at these irreligious practices, and the emperors, who were concerned in the peace of their dominions, concurred in remedying these evils; which was at length effected by excluding the laity, gradually, and by insensible degrees, and confining the election to the ecclesiastics. Many of the emperors, indeed, struggled hard to get the nomination to themselves, but the clergy proving too powerful for them, they obtained, at most, but a power of recommendation*.

In the northern kingdoms the same causes produced the same effects, as to the exclusion of the laity, but with more advantageous circumstances to the rights of these princes. For as the lands they gave to the bishops in right of their churches were held of

*Gibson, Cod. Jur. Eccles. Anglican. tit. 23.

them, so they gave the investiture; and there was a kind of concurring right between the clergy, who elected, and the king. He insisted on his right of giving the investiture, but generally received their nominee, and granted it to him.

But after the time of Charles Martel, when the clergy were stripped of most of their lands, things took a different turn. For when new grants were made to the church by the king, he insisted, as feudal lord, on the absolute nomination, and the giving investiture, by delivering the staff or crosier, the emblem of his pastoral care, and the ring, the symbol of his spiritual marriage with the church; but these rights were opposed by the clergy, who were strongly supported by the popes then sitting up for being the feudal lords of all churchmen, and who hoped to derive, as they did, great advantage from these dissentions. From the year 1000 to 1200, great confusion subsisted throughout all Europe, occasioned by these contests, until the popes in general prevailed; but for four hundred years past, and particularly since the reformation, their power hath been on the decline; and from this last period, the patronage or advowson of bishopries hath been confessedly in our king, as hath been the case in several other kingdoms; and though in England a form of election is still retained, it is no more than a mere form†.

The advowson, or patronage of inferior benefices, came in another way. In order to understand this,

†Montesquieu, l'Esprit des Loix, liv. 31. chap. 11. Bacon, hist. and polit. disc. on the laws and government of England, ch. 59. Inett's hist. of the English Church, vol. 2. ch. 2.

let us consider how dioceses came to be sub-divided into parishes. Anciently, I mean about the year 420, the bishop had the sole cure of souls throughout his whole district, and received all the profits of it; which he and the clergy distributed into four parts, not exactly equal ones; but unequal, according to the exigencies of the several interests to be considered; one to the bishop, to maintain hospitality, and support the clergy residing with him, and the christians of other places, who were often forced to fly from persecution, or travelled on their necessary concerns; one for the building and repair of churches; one for the poor, and one to support the inferior clergy, whom the bishop used to send to particular places, as his deputies, and to remove or recal at his pleasure. The clergy who lived in the city where the bishop resided, were supported by him in a collegiate way at first; until at length their particular shares were ascertained, and carved out of the general revenue of the church; and this was the origin of *chapters**.

To return to the country clergy. The manner in which they came to have settled establishments was thus: It was usual, as soon indeed as tithes were established as a law, that is, before or about the time of Charlemagne, for the bishop to allocate to his vicar or curate in any district, the whole, or a part of the tithes or other profits arising there; but when England, France, and other countries were ravaged by the Danes and Normans, the fury of these barbarous heathens fell particularly on the ecclesiastics. Their churches they burned, and themselves they slaugh-

*Gibson, Cod. Jur. Eccles. Anglican. tit. 23.

tered without mercy; insomuch that, when their devastations ceased, there ensued not only a great scarcity of clergymen, but such a want of means of proper support for them (the old estates of the church having been turned into military fiefs) that the feudal lords were willing, for the sake of having divine service performed in their districts, for the benefit of themselves and their vassals, to alienate part of their lands to the church, which was then in indigence, for the purpose of building houses for the parson, and providing a competent glebe for him, and also for building new churches where they were wanted. Although alienation was at this time entirely disallowed by the feudal customs, yet the necessity of those times prevailed against it in those instances, especially as these superstitious people attacked, or ready to be attacked by an heathen enemy, thought the lands so given to be really given for military service, as they were given for the service of God, the Lord of Hosts, who was to speed their arms. However, the circumstances and opinions of that age would not allow any grant, without an acknowledgment of the superiority of the grantor; nor allow any lord to give any grant materially detrimental to his military fief. Hence, as an acknowledgment that the lands so granted to the church proceeded from the bounty of the lord, he was allowed to nominate a clergyman to the bishop; who, if he was qualified, was obliged to admit him. But as the patron might present an improper person, and such an one as the bishop must be obliged in conscience to reject; and might do this repeatedly, for any considerable length of time, during which the duties of religion would be neg-

lected, it was, in after times, settled, in all countries, that the right of the patron's presentation should last only a limited time. In our countries it is six months; after which time lapsed from the vacancy, the bishop's original right of nomination revives*.

But the customs of those ages not admitting of the alienation of any part of a military tenure, but what was absolutely necessary, it followed that these glebes were far from being sufficient for the maintenance of a parson. These grants, therefore, were not made without the consent of the bishop, to allocate, in aid of the glebe, the tithes of that precinct, to the use of the parson. And now the parson began to have a permanent interest for life in his parish, and a permanent cure of souls therein; but not exclusive of the cure of souls in the bishop, who was concomitant with him in that point, though not in the profits. For when the bishop, for the good of the church, appropriated a part of the revenues of the church to a particular person and his successors, which, for the public good, he was allowed to do, he could not, however, divest himself, or his successor, of that general cure of souls through his whole district, which was the essence of his office. As the parson, therefore, though named by a layman, was his deputy, he was in truth (to speak by way of accommodation) his feudal tenant. From him he received institution, which is the improper investiture; to him he gave the oath of canonical obedience, which is equivalent to the oath of fealty; and by him, or persons appointed by him, he was inducted into his church, that is, had livery and seizin given him†.

* Ibid. † Ibid. and tit. 30.

This was the origin and nature of presentative advowsons, in which, though a matter ecclesiastical, the lay patron was allowed to have a temporal and a valuable interest: inasmuch as it might serve for a provision of one of his children, or any other relation that was qualified for it; and consequently be an ease to him; and as, at the time that these glebes were granted most fiefs were hereditary, at least none were suffered to be granted but by those who had such (because the lord superior might else be disinherited) this right of *advowson presentative* descended to the heir. The church in its distress exceedingly encouraged and fostered these rights for a time; but when her circumstances changed, and, in ages when profound ignorance prevailed both among the clergy and laity, many were the attempts to deprive the laity of their rights, and many the exclamations against the impropriety and impiety of such persons pretending to name any one to an holy office. But I do not find they ever thought of restoring to the laity the glebes, in consideration of which, for the necessities of the church, those rights were first allowed.

Thus much for *presentative advowsons*, which, I hope, from what hath been already observed, will be sufficiently understood for the present. I now must proceed to *collative advowsons*, namely, those given by the bishop, which were of two kinds; either absolutely in his own right, or by lapse, when the patron neglected to present; which was in truth but a devolution of the ancient right he had parted with, to him; and therefore as there is no substantial difference, they may well be treated of together. As the bishop in the case of lapse, collates, that is, institutes in his

former right in default of the person who had the right of presentation, I observed before, that the bishop had used to grant to the country clergy a part or the whole of the tithes of the precincts they served in; but when once, by the allowance of presentative advowsons, parsons had got freeholds in them, the example became contagious, and much to the benefit of the church. Those parts of the diocese which still remained in the bishop's hands were divided into parishes; and the tithes of them, or at least a considerable part of them, were assigned to the minister for his life. I need observe no farther of these, than to say, that they differed no otherways in their nature from the last mentioned, than that, as a patron had nothing here to do, there was no presentation, and that, *collation* is, in the case where the bishop hath the sole right, what is called *institution* in the case of a clerk presented.

The third and last kind of advowsons are those called *donatives*, in the giving seizin of which the bishop hath nothing to do, such livings being privileged, and exempt from the jurisdiction of the bishop, and visitable by the patron only. How these exemptions arose, when, at first, every place was a part of a diocese, and of the bishop's cure of souls, it will be worth while to inquire. The bishops of Rome, aided by their great riches, and the fall of the western empire, did, by pursuing a settled plan for many hundred years, with the greatest art and unshaken perseverance (temporizing indeed when the season was unfit, but never giving up expressly any point that had been claimed) at length, instead of being the first bishops in rank, attained to a jurisdiction over all the west, and claimed

a general cure of souls, which made the bishops, indeed, but pastors under them. However, conscious of their usurpations, in order to establish them, it was necessary to depress the episcopal order.

They began first with dismembering bishoprics, in order to found new ones, on pretence of the churches being better served; and this they did principally in Italy, where their influence was most extensive; and that with a view, by having a greater number of votes, to over-rule the determination of the general councils. They did the same, but more sparingly, for the reason aforesaid, in other countries, with the sovereigns; who, in these cases, were really actuated by the motive of advancing the publick good, and promoting religion. The next step was more decisive.—Their authority being now established, they took occasion, on several pretences, to exempt from the jurisdiction of the bishops, several places within their dioceses, which they kept immediately under themselves, to which they appointed clerks by this way of donation, and whom they visited by their legates, as their immediate ordinary. The clergy, thus provided for, served as faithful servants and spies to the pope, in all parts of the christian world, and were next to the monasteries, the firmest support of his power. The same practice they pursued with respect to bishoprics, by exempting several of them in divers places from the arch-bishop of the province. And this was the origin of donatives. But, in order to shew the plenitude of their power, the next step they took was of a higher strain. They not only founded donatives for themselves, but for others, even of the laity; shewing by this, that all ecclesiastical jurisdiction

and discipline was entirely subject to their will, and that, at pleasure, they could transfer it to hands before judged incapable of it.

These two kind of donatives still subsist in England, the latter in the hands of subjects, the former of the king as supreme ordinary, since the pope's usurped power was transferred to Henry the Eighth. I am sensible many common lawyers insist that the king of England was always supreme ordinary, and that nothing new was gained at that time; but only his old authority, which the pope had usurped, restored to him. But what shall we say to the first fruits and tenths; which are certainly papal impositions, and comparatively of a modern date. The same I apprehend to be the case of the ordinary jurisdiction. As to the supreme patronage, I allow it was, originally, the king's. My reason is, that I do not find in the ancient church any trace of a layman solely exercising ecclesiastical jurisdiction, or enacting laws for the church†.

In the apostolic times all things were transacted by the *faithful* at large; in the next age, they fell into the hands of the clergy, all excepting the election of bishops, and approbation of clergymen. After the emperors became christians, they published indeed ecclesiastical laws, but that was only giving the sanction of the imperial power to the canons the church had made; whose censures, when there were such multitudes of new and counterfeit converts, were likely to have little weight. In the northern nations the case was the same. Canons were made by the clergy, and these were often enforced and turned into obligatory laws

†Gibson, Cod. Jur. Eccles. Anglican, tit. 34.

by their general assemblies, who had the legislative authority; and if there are any instances in those times of laymen exercising ecclesiastical discipline as ordinaries, I own they have escaped me. I speak merely of ecclesiastical discipline: for as to things of a temporal concern, such as wills, administrations, marriages, tithes, &c. the authority undoubtedly was from the king. But not as to matters entirely spiritual, such as concern the *salutem animæ*‡.

I think therefore the king's title to be supreme ordinary, stands better settled on the parliamentary declaration, and on the reason of the thing, that all coercive power should be derived from him, whom God hath made the superintendant; than on the assertions of lawyers, that it always was so. Matters of fact are to be determined by evidence, not by considering what ought to have been; and we need not be surprized to find, that an ignorant and superstitious people allowed practices, and a division of power in themselves unreasonable.

In those donatives there was neither institution nor induction. The patron gave his clerk a title by deed, on which he entered; for the plenitude of the papal power supplied all forms. The patron was the visitor, and had the power of deprivations; but what clearly shews, in my apprehension, that these donatives were incroachments on the episcopal authority, is, that, if once a common patron (for the king was saved by his prerogative) had presented his clerk, and he got institution and induction, the donative was gone for ever. The living became presentative, and the bishop's jurisdiction revived.

‡ Gibson, tit. 1. and 2.

I should next proceed to tithes, another kind of incorporeal benefice; but this would carry me too great a length for the present discourse.

LECTURE IX.

Tithes....The voluntary contributions of the faithful, the original revenue of the church....The establishment of regular payments....The appropriations of the church....The history and general rules of tithes in England.

THE next kind of incorporeal benefices taken notice of by the law of England, that I shall mention, is *tithes;* the New Testament, as well as common reason, says, that *they who serve by the altar, should live by the altar;* but is silent as to the manner in which this support should arise. In the very first times, when their numbers were but few, and those confined to Jerusalem and its neighborhood; the christians sold all they had, and lived out of the common stock. But this lasted a very short time. When they increased to multitudes, that method was found impracticable, so that each retained his possessions, and gave a voluntary contribution out of it at his discretion. This was the fund of the church; and in those times of fervent zeal in the laity, and simplicity of manners in the clergy, it was found abundantly sufficient, not only to support the ministers, and their own power, but also to build churches, and to do many acts of charity to some of the pagans.

The revenues of the church went on continually increasing to the time of Constantine; and though by the Roman laws, no *colleges*, as they called them, that is, communities or fraternities, unless they had

the sanction of the imperial authority, could accept legacies or donations; yet, such was the devotion of the times, that many such private grants were made; and the principal churches obtained great acquisitions, not only in moveable goods, but in landed estates; insomuch that some of the persecuting emperors were thought to be as much instigated to their cruelties by avarice, as by their blind attachment to their pagan superstition*.

In the fourth century, the restraint being taken away, these largesses from the rich and superstitious to the church became much greater; but the general voluntary contributions from all who could spare, diminished, the apparent necessity for them being lessened; and the zeal of the people, which persecution had kept warm and fervent, slackened from ease and security. The bishops, who were the distributers, prided in vying with each other in the magnificence of their churches; and, being now raised to an eminent rank in the state, were not satisfied to live in such a manner as contented the simplicity of the ancient fathers of the church; so that by the year 400, the inferior clergy and the poor were, in many places, but in very scanty circumstances. This induced many of the pious to fix upon a certain rate out of their own annual gains to supply these necessities, and as the tenth was what had been assigned to the Levites in the mosaical law, that generally became the proportion. But as the payments of those tithes were purely voluntary, so did the givers appropriate them

*Father Paul on beneficiary matters, ch. 2. and ch. 6. Selden's history of tithes, ch. 4. sect. 1. Spelm. large work of tithes, ch. 6.

in such manner as they pleased, and as they thought they were most wanted†.

In Egypt, where, it seems, this practice began, they were commonly given to the monks, who had devoted themselves to a religious poverty; in Illyricum generally to the poor; in other places to the inferior clergy of such a district, or, if the church itself was indigent, to the bishop, for the use of his church. The famous preachers about this time, particularly St. Ambrose and St. Augustine, inforced this practice with all their eloquence, and insisted on the levitical law of tithes as binding on christians. This had great, but not general effects. Some gave the tithe, others, of more zeal, gave more, and others less; and though these contributions began to be aided by the spiritual arms of excommunication, yet were these only used to oblige a man, in testimony of his being a christian, to make some offering, not to pay precisely the tenth, or any other portion‡.

These payments of the tenth hitherto we see were voluntary; but there soon came in another practice, which, in particular places, made them compulsory. It was usual when a patron founded a church, in order for its support, to charge his lands with the payment of tithes to the minister who officiated therein. This created a permanent right in the church, not by the force of any general law, or canon (for all such attributed to these ages are forgeries of a later date) but from the especial gift of the grantor, and the power he had to charge his land. The earliest

† Selden's hist. of tithes, ch. 6. and 7. Spelm. larger work of tithes, ch. 29.

‡ De non temerand. Eccles. tract. Spelm. p. 3.

authority that proves a general right of tithes, through any country of Europe, is to be met with in the council of Mascon, held under king Guntram, who reigned in the southeast parts of France, in the year 586. There the right of tithes, through all his dominions, is acknowledged as an ancient duty due to the church; and they are enjoined to be regularly paid. But it is observable, in the very words of this law, that the tithes so paid were not solely appropriated to the clergy, but much of them applied to other charitable uses, *unde statuimus, ut decimas ecclesiasticas omnis populus inferat, quibus sacerdotes, aut in pauperum usum, aut in captivorum redemptionem erogatis, suis orationibus pacem populo & salutem impetrant.* Thus the kingdom of Burgundy was the first that established the universal payment of tithes by a positive law. This payment, in the other parts of France, was long after at pleasure, or by particular foundation; but was daily gaining ground, especially after the impoverishment of the church by Charles Martel rendered them the more necessary; and his grandson Charlemagne was the first that established them by a positive law, made in a general assembly of the states, through all France; and that as due by a divine right, in the year 778. And as he and his successors were masters also of Germany and Italy, the same law and opinion soon passed into those countries†.

But as positive as his law was, in the direction of payment of them to the bishop or priest, it was for a long time not universally obeyed, and where it was

†Montesquieu, l'Esprit des loix, liv. 31. chap. 12. Selden of tithes, ch. 7. Father Paul of benefices, ch. 11.

obeyed, often shamefully eluded, as appears by the laws of his successors, and many ecclesiastical canons framed for the redressing those mischiefs. For as a portion of the tithes was originally distributed to the poor, under this pretence, it was customary for the superstitious laity, when they granted the tithes, instead of assigning them for the maintenance of the ministering, *i. e.* the secular clergy, to appropriate them to monasteries, which were societies of voluntary poor. These appropriations, or consecrations, as they were called, became very numerous, both from the unbounded veneration paid to the monks, and from the encouragement such grants received from the see of Rome, which looked upon the monastic orders as its fastest friends, and was bent upon raising them on the ruin of the secular clergy. But as the monks of those times were generally laymen, and incapable of serving the cure, it grew into a practice for them, if any of their own body was fit for the purpose, to get him ordained; or if they had none, to employ a secular priest to perform the divine offices, under the name of their vicar or deputy, who was to account with them for the profits, and was to receive for his subsistence a stipulated proportion; and thus came in the division of parochial tithes, into *rectorial* and *vicarial*; the former remaining in the *employer*, the latter in the *employed*, who did the duty‡.

The same pretence of appropriating the tithes to the poor gave a handle likewise to many, when they found it necessary to pay tithes, to grant them to laymen in fee, under the like conditions and services as other fiefs; and many likewise were the unworthy

‡ Father Paul of benefices, ch. 14.

churchmen, who turned the incomes of their church into provisions for their families, by granting them in fief. Thus, in process of time, were the ministering clergy, and the real poor, for whose support the tithes were originally granted, in a great measure stripped of them; and they were converted either into lay inheritances, for secular services, or applied to the support of monasteries; and both these abuses began under the specious pretence of charity. The latter, viz. the grants to monks, was always favored by the heads of the church; and the former, in spite of all their censures, prevailed, until, at length, it was found necessary to apply some remedy to both. The evils were too inveterate to be finally removed; but this temper was found out in the council of Lateran, held in 1215, when it was enacted, That all tithes which from time immemorial had been given in fief might so continue, but no more be granted in that manner for the future; and the appropriations to monasteries were confined to three orders of monks who were looked upon as the most learned, and capable of furnishing men fit for the duty‡.

I shall proceed now to say something of the fate of tithes in England. That tithes had been paid in several parts of England during the heptarchy, and established by law in some of its kingdoms, is undeniable; but the first who ordained them by law, through all England, was Ethelwolf, in his parliament for the year 855; who had been himself, in his elder brother's life, designed for the church; in this imitating Charlemagne, at whose court his father had long resided. This may well be allowed, although

‡ Giannone's hist. of Naples, b. 19. chap. 4. § 2.

those authors that give us the copy of this law differ in the date, both as to the time and place where it was made. But be that as it may, his son Alfred certainly made a law for this purpose, to bind not only his own English, but also the new converted Danes, to whom he assigned seats in his kingdom, and whom he had submitted to the government of Guthrun. Such laws were renewed by almost every one of his successors down to the Norman conquest; an evident proof, that however zealous those princes were for the support of the church, their pious intentions were but ill seconded by their people. The severity of the law of Edgar was remarkable, and of itself sufficient cause of their backwardness; for it made the non-payment of the tenth a forfeiture of eight tenths. The *præpositus* of the king and bishop, that is, I presume, the sheriff and arch-deacon, were to seize the fruits out of which the tithes had been withheld, and when they were divided into ten parts, one was given to the church that had been defrauded, another to the proprietor, and the remaining eight were divided between the king and the bishop†.

During these times appropriations of tithes, to other churches than the parish one, and also to monasteries, were frequent, here as well as on the continent; but, for some time after the conquest, the largesses to the monks, with respect both to lands and tithes, increased considerably, and were continually encouraged by the popes, the kings, the bishops, and nobility; by the popes for the reason already given;

† Selden on tithes, chap. 8. Bacon, hist. and polit. disc. on the Laws and Government of England, chap. 59. L. l. Angl. Sax. ap. Wilkins.

by the bishops and nobility, who were all Normans or foreigners, out of partiality to their countrymen (for such the monks generally were) and out of contempt and hatred to the secular clergy, who were universally English; by the kings, not only for this last mentioned cause, but for another peculiar to themselves. The government of the Saxon kings was remarkably moderate, and their laws and constitutions extremely favourable to the liberties of the people. The first race of Norman kings pretended, indeed, a right to the throne, and every one of them swore to observe the Saxon laws, with such emendations as had been consented to in parliament by William the First. But the conduct of every one of them showed how little regard they had to that obligation, and how bent they were on setting themselves free from all restraint, and to destroy all traces of the old Saxon laws. For this purpose it was absolutely necessary to depress the secular clergy; who, in those times of ignorance, were the only lawyers; insomuch, that, in William the Second's reign, it was said, *nullus clericus, nisi causidicus*; and, to render them unfit guardians of those privileges, the kings were resolved to trample upon them. For this end, a new language and new forms of proceeding were introduced into the courts, the secular and ecclesiastical jurisdictions, which had been united, were separated; and the clergy were banished from the temporal courts, and the greatest part of the business which formerly had been transacted in the country courts was transferred to the *curia regis*, under the immediate inspection of his judges†.

† Brady, Appendix to his hist. p. 15. Carte, hist. of England, vol. 1. p. 441.

Thus were the secular clergy daily reduced in circumstances and importance, while the monasteries flourished on their downfal. However, about the time of Henry the Third (for it is hard precisely to fix when it became an allowed maxim of the English law) all tithes arising in any parish were, of common right, payable to the priest of that parish, unless they had been previously appropriated to some other priest, or monastery, either by a positive appropriation appearing, or by prescription where that was lost, and that no layman could prescribe against the payment of them. I say no layman, for with respect to ecclesiastics, the case was otherwise. It had, indeed, been a controversy in France several centuries before, whether the lands of a church or monastery should pay tithes to the parish minister where they lay; but it was determined by the better opinion that they should. However the bishops of Rome, in complaisance to their friends the monks, granted to many monasteries an exemption from tithes for their lands. And these are the lands, which we see at this day in the hands of laymen discharged of tithes, by virtue of a statute in the reign of Henry the Eighth; before I proceed to which, it will be proper to take notice of what a *modus* is, as they were introduced in those early times.

A modus, then, is a composition for tithes in kind, within a certain district; whereby the layman is discharged from rendering his tithes, on his paying to the parson, in lieu thereof, what the local custom of that place directs. These compositions were originally for the mutual benefit of the clergy and laity; that one might have a settled certainty what to re-

ceive, and the other what to pay; and was, while the equivalent continued to bear any reasonable proportion to the value, an excellent means to prevent yearly disputes between the minister and his flock; but as most of them are fixed at certain rates of money, the change of its value has, in all these cases, greatly impoverished the parochial clergy, especially as many of them grew up into a prescription, by the negligence of the clergy, without an original composition. These *moduses* have, likewise, not a little hurt the spiritual jurisdiction; for as their courts paid little or no regard to them, as being against the canon law, if the original composition did not appear to have the bishop's authority, by being found in his registry, the temporal courts, wherever one is pleaded, send a prohibition to the ecclesiastical one, and reserve the trial to themselves, by a jury of twelve men, as the legal judges of the custom†.

When Henry the Eighth threw off the pope's supremacy, great was his danger both from abroad, and at home, particularly from the monasteries. A resolution therefore was taken for suppressing them, and applying their revenues to more useful purposes. The intention of Cranmer, at least, was to restore the tithes to the parochial clergy, and out of some part of the lands to found new bishopricks, and for other religious and charitable purposes; the remainder to be united to the royal demesnes to enable him to defend his realm without burthening his subjects with subsidies. But little of this kind was done. Five or six bishopricks, with very poor revenues, were erected, and the rest, both of lands and tithes,

† Selden on tithes, chap. 14.

were distributed to the laity in whose hands they still remain, partly out of present political views, but principally from the extravagance of that king and the indigence of his successors, concurring with the avarice of their courtiers. As to the lands the abbots held discharged of tithes, the parish ministers' right to them would, by the common law of England, have revived as soon as they got into lay-hands; as it would have done before, if the abbot had aliened with the consent of the convent, and this was the case of the lands of the lesser monasteries. But when the greater ones were dissolved by the act of 31st of Henry the Eighth, it was expressly provided, that the king and his grantees should enjoy those lands, discharged from tithes, in as ample a manner, as the abbots held them before that time. Thus became a great part of the tithes of the kingdom, which by the common law of England were the legal maintenance of the parochial clergy, lay fees, and inheritances, as they continue at this day†.

Tithes are of three kinds, *prædial*, *personal*, or *mixed*. Prædial, are the fruits arising immediately from the ground, as all sorts of grain, hay, underwoods, fruits of trees, hops, saffron, hemp, flax, and such like. Mixed, which arise from cattle nourished by the ground, as their young, colts, calves, lambs, pigs, or their productions, as milk, cheese, butter, &c. Thirdly, personal, which arise from the labor and industry of men using any merchandise, or manual occupation, and is the tenth part of their clear gain.

† Carte's hist. of England, vol. 3. p. 135, 143, 148, 149. Lord Herbert's life and reign of Henry VIII. p. 186. et seq. ap. Kennet.

The two first had their foundation in the law of Moses, the last was introduced and strongly inforced by the canon law, nay so shameless were some of the canonists, as to insist that harlots were obliged to pay the tenth of their infamous gains; but this latter kind has had little effect in England, except by the local customs of some particular places‡.

As to what things are tithable or not by our law, it may not be amiss to lay down some general maxims concerning them.

First then, as to prædial tithes: Regularly, they are due only out of things that increase annually, *simul & semel*, and therefore except by special custom, mines, minerals, chalks, stones, slates, turfs, being part of the soil, and not increasing annually, are not tithable; but this rule admits of some exceptions, of which I shall just mention two. Saffron, which increases from three years to three years, is yet tithable; and so is underwood, that is, all trees cut under twenty years growth. The tithes of trees occasioned many contests between the clergy and laity in England, the one exacting it by their canons, and the commons in parliament constantly remonstrating against it. At length it was settled by parliament, that none should be exempted but timber above twenty years growth, as being fit for building. But this statute is so constructed, that if the trees be not of the nature of timber, they are tithable, though above that age, as bush, birch, and the like; but these, if for the scarcity of other timber, they are used in building, as beech is in Buckinghamshire, they are there exempted.

‡ Gibson, Cod. Jur. Eccles. Anglican. tit. 35. Hume, vol. 1. p. 51.

As to mixed tithes, the rule is, that things *ferœ naturæ* are not tithable. Therefore fish, pheasants, partridges, rabbits, deer, bees, and such like are not; but several of these, if reclaimed, have been adjudged to be so, as bees in a hive, and the same reason holds as to pigeons in a dove house; though the opinion of common lawyers is, that they are not tithable, if spent in the house, and not used for sale.

But what shall we say for barren cattle, from whom no yearly profit arises? Shall the parson receive no benefit whatever from them, and shall it lie in the power of the occupier, by employing all his land in feeding nothing but barren cattle, to leave his minister without support? Certain it is, whatever the modern practice and opinion may be, that by the best authorities of the ancient lawyers, *agistment* was due to the clergy which was the tenth part of the value of the lands, or the twentieth, which by custom, in most places, was generally paid, if the proprietor depastured the whole year, or less, according to the time and quantity of the cattle, saddle horses, or cattle for the plough, only excepted†.

Thus much may suffice for the history and general rules of tithes, the second species of incorporeal rights, to which I may add, as much of the same nature, and founded on the same reason, what is called *ministers' money* out of houses, in cities and towns, where there are no tithes, which the act of parliament, of the 17th and 18th of Charles the second, hath restrained to the twentieth part of the value of houses, as valued by a commission from the Lord Lieutenant and six of the council.

† Wood, Institute of the Laws of England, fol. 161. et. seq.

LECTURE X.

The right of Seignory and its consequences....The right of Reversion....Rent seck....Rent charge....The nature of distress, *as the remedy for recovering feudal duties. Observations on* distresses *in general.*

HAVING spoken of tithes and advowsons, two kinds of incorporeal benefices that arose in those ancient times, I come now to treat of *seignories* and their consequences. A seignory is an incorporeal right and interest still remaining in the lord, when he parts with his lands, in benefice to a tenant. Now the rights of a lord, in respect of his seignory, may be considered in two ways, either as the services were due to the lord from the *person* of the tenant, or from the *lands*. He hath therefore, in virtue of his seignory, a right to all those personal duties which flow impliedly from the oath of fealty; such as to receive warning from his tenants of any injury done, or impending danger to his person, his dignity, or seignory, to receive faithful advice from them when called upon, and to have his secrets faithfully kept by them; to be the judge of their controversies, and the leader in war of such of them as hold by military service. For these barbarous people had no idea of dividing power, but always entrusted the civil and military sword in the same hands; whereby they avoided the dangers and disorders that more polished and richer nations have ever been ex-

posed to, namely, of having the civil and legal authority subverted by the military power. And so strict was the bond between lord and tenant, that the latter could in no wise, in point of judgment, decline his lord's jurisdiction, by refusing him as judge on account of partiality. Such a charge was a breach of fealty on the vassal's part, and no such presumption could be admitted by that law, which looked upon the lord as equally bound by the oath of fealty, though not taken by him, as the tenant was*.

By the Roman law, a suspected judge might be refused by the suitors for almost all the same causes, and grounded mostly upon the same reasons, for which jurors, who in our law are *judges of the fact*, may be challenged at this day. But the feudal customs admitted no such suspicions as to the lord, and therefore in the English law, no judge, however clearly interested in the cause, can be challenged.... This maxim once established, it was necessary, however, for the sake of justice, that it should admit of some qualification. The *assessors* in Germany, who assisted the lord in judgment, from whom came, in after time, the *pares curiæ*, were this qualification.... But as these were not judges in all feudal causes, but in some the lord alone continued sole judge; some remedy was here to be applied, and on the continent and in England, they proceeded differently. On the continent, the king, or superior lord, appointed a *cojudge*, or assessor. In England the suitor, by applying to the king's courts was empowered to remove the cause thither; which hath been one

*Madox, Baronia Angl.

great occasion of these inferior courts of the lords dwindling to nothing*.

As to the right the lord had in the land by virtue of his seignory, the principal, and upon which his other rights out of the land depended, was his *reversion*. A reversion is that right of propriety remaining in the lord, during the continuance of the particular estate of possession of the tenant; whereby he is entitled to the service during the duration of the term, and to the possession itself, when it is either expired, or forfeited. Hence it appears that the fealty and services of the tenant are incident to the lord's reversion. Out of these reversions may be carved another incorporeal estate, called a *remainder*, which is a particular estate dependant upon, and consequent to a prior particular estate; as if lands be granted to A. for five years, and afterwards to B. for life. In this case A. hath a lease for years, B. a remainder for life, and the reversion remains in the grantor. In our law, remainders, and the particular precedent estate on which they depend are considered as making but one estate; and so, in truth, they are with respect to the reversioner, though not to each other. Therefore they must both pass out of the grantor at the same time, though it is not absolutely necessary that the remainder should vest in the grantee at the creation of the precedent particular estate; for a remainder may be good which depends on a contingency, as if a remainder, after a lease for life or years to A. is limited to the eldest son of J. S. This is a good remainder, but a contingent one, depending on the birth of J. S's son dur-

*4. Instit. 268. Scroggs of Courts Baron, p. 56.

ing the continuance of the term of A; for the remainder being but one estate with the precedent particular one, and only a continuation of it, must commence instantly when it determines. Or, if after a lease to A. a remainder is limited to the heirs of J. S. this is a good contingent remainder, depending on the event of J. S. dying during the particular estate. For it is a maxim of the English law, *Nemo est hæres viventis.*

To return to reversions, I mentioned fealty and services as incidents of a reversion; but we must distinguish that fealty is an inseparable one, which the services are not; for the tenure being from the reversioner, and fealty necessarily incident to every tenure, it is impossible they should be separated. A grant, therefore, of fealty, without the reversion, is void; and the grant of the reversion carries the fealty with it. But the case is otherwise as to the services; for the services may be granted without the reversion, and although the reversion be granted, the services, by special words, may be excepted.*

It will be now proper to speak of the remedy the reversioner hath for the recovery of his services, if they are not paid. In the ancient times the tenant was, at all the due times, at his peril obliged to perform his service; for as each the smallest failure was a breach of his fealty, his tenancy was thereby absolutely forfeited, and this long continued to be the case in military tenures. But as the defence of the realm was not concerned in the socage holdings, but only the immediate interest of the lord, it was thought too hard, that every, perhaps involuntary

*Coke on Littleton, lib. 2. chap. 12. § 215.

omission, should induce an absolute forfeiture; when the lord, where his dues were certain, might receive an adequate recompence. Custom, then, introduced the method of *distress*, in imitation of the Roman law, as the proper method to recover an equivalent for the damages he sustained by the non-performance of the duties. And afterwards, when the personal service of the military tenants came to be commuted into a sum of money called *escuage*, distress came to be the regular method of recovering that and the other fruits of the military tenure; the damage the lord sustained being now capable of a reduction to a certainty*.

The introduction of distress on socage tenants was thus: When the absolute forfeiture was thought too severe, the first step was, that the lord should enter, and hold the lands till his tenant had satisfied him as to his damages; but as this seizure frequently disabled the tenant from making that satisfaction, especially if he had no other lands, this, after some time, was thought still too rigorous, and in its stead was substituted the seizure of the cattle, and other moveables found on the land, and the detention of them as a pledge, until the damages were answered; which is what we call *distraining*. This was a sufficient security to the lord, as it rarely happened but that there was sufficient found to answer his demand for one failure; and the tenant was not (as not being deprived of his possession) reduced to an incapacity of paying his rent of services, and thereby recovering his pledges. Hence all feudal rents, or, as our law calls them, *rent services*, (being the service the ten-

*Madox, Antiquities of the Exchequ. vol. 1. p. 652.

ant pays to the lord, in consideration of the land he holds from him) are distrainable.

But there was another species of rents in our law not distrainable; which, therefore, was called *redditus siccus*, or *rent seck*. This was not a feudal service, not being paid from a tenant to his lord, and was thus: When a man, keeping still his land in himself, grants a rent thereout to a stranger, the grantor is justly bound by his grantee; but the grantee, not being his lord, cannot have this remedy. For the remedy of distress being substituted in the place of the lord's right of entry, could not be extended to a stranger, who never had that right. And this was originally the only kind of rent seck; but the statute called *quia emptores terrarum*, introduced another species of rents not distrainable, by converting rent services into rents seck. The liberty of alienation without the consent of the lords having been allowed before that statute, it became customary for a tenant who sold his land, and parted with his whole estate in it, to reserve the tenure of the *vendee*, not to his superior lord and his heirs, but to himself and his heirs; whereby he retained many advantages to himself, by continuing the vendee's lord, such as the right of escheat, if the tenant died without heirs, and the benefit of the wardship and marriage, if it was held by knight's service. Now a rent reserved upon such a sale to the vender, was, as he continued the vendee's lord, a rent service, and consequently distrainable†.

But this practice, though highly useful to the sellers, was of considerable detriment, not only to their lords, who thereby frequently lost the fruits of their ten-

†Coke on Littleton, lib. 2. chap. 12.

ures, but indeed to the whole military policy of the kingdom. It was enacted, therefore, in the eighteenth of Edward the First, by the statute above mentioned, that whenever a man alienedhis whole estate, the alienee should not hold from him, and be his tenant, but from the superior lord, and be the lord's tenant directly; and that by the same services, by which the alienor had holden. The alienor, then, by this statute, ceasing to be lord, and his right of reversion clearly gone, if he reserves a rent on such alienation, he cannot distrain for it, and it is a rent seck.

These rents seck, therefore, were of two kinds, one arising by grant, which was the most ancient, the other by reservation, when a man alienedhis whole estate. For if the whole estate was not gone, but a reversion remained in him, a rent reserved was still, on account of that reversion, a rent service; as if A. gave lands to B. and the heirs of his body, reserving rent. As this estate tail, although it might continue forever, yet was capable of determination by the failure of that issue, such rent was distrainable, for that reason, and also because, by the statute which gave force to such estates tail, the reversion was saved to the donor. But if he had made a lease for life or years, or a gift in tail, and had, at the same time, conveyed over the remainder in fee, so that his reversion was gone, a rent reserved on such a grant was *seck*.

The inconvenience attending these rents seck, in their not being distrainable, introduced another species of rents called *rent charges*. These are rents seck, armed with a power of distress by the special agreement of the parties; and are of two kinds, as the former are created either by *grant*, or *reserva-*

tion. Those by grant, which were the only species of rent charges before the statute, were thus; as if I grant out many lands, keeping them still in myself, a rent for years, life, fee tail, or fee simple, and give my grantee a power to enter and distrain for the rent. It will be by reservation; if I reserve to myself a rent upon a conveyance in fee simple, or upon a gift in tail with a remainder over in fee, or upon a lease for life or years, with a remainder over in fee, and it is covenanted that I shall have a right to enter and distrain for the rent. The power of distress, therefore, in rent charges is good only by the express provision of the parties, not by the force of the general law*.

Anciently it was a doubt whether a rent charge could be reserved upon a *deed poll;* to understand which, it will be necessary to explain the difference between a *deed poll* and an *indenture.* A deed poll is a grant from one man to another, and is all and every part of it the act and words of the grantor only; and therefore the deed belongs to the grantee, and there is no counterpart in the hands of the grantor; because the grantee binds himself to nothing towards him. Whereas in an indenture, every clause is the act and words of both. They are mutually bound to each other, and therefore there is a counterpart in the hands of each party. Now if A. by deed poll, granted lands in fee to B. reserving rent, with a clause of distress, it was doubted whether this clause was not void, and the rent a rent seck; because as the lands by A's grant was in B. it was apprehended they could not be charged with it without an express

*Coke, ut supra.

covenant from him; as in the deed poll he was a party merely passive. But it is now held, and that very equitably, that such a reservation can raise a good rent charge; for his acceptance of the deed upon the delivery is an act sufficient to shew his assent to take it on the terms therein contained; and nothing can be more reasonable than that whosoever takes a benefit shall take it under such conditions, and no other than such as the donor intended.

Thus have I endeavored to explain the nature of the three several kinds of rents in our law, of which only rent service is properly feudal; but upon account of the affinity of their nature, I thought proper to join them here. It will be proper now to say something concerning the nature of *distress*, as it was the remedy for recovering the feudal duties in these kingdoms.

Distresses were not only taken for rents, and other services reserved, but also to oblige persons to appear in courts of justice, or to raise fines and amerciaments inflicted on them. This likewise arose from the feudal law, as by that the doing suit and service at the lord's court was one of the duties attendant on fealty.

But there is another kind of distress allowed by our law, arising neither from the feudal contract, nor the express stipulation of the parties, but from the *delictum*, or negligence of a stranger. It is called a *distress for damage feasant*, and is a seizure of the cattle, or any other moveable of a stranger, trespassing upon or damaging my ground. The law in this case will not put me to my action against the proprietor, whom perhaps I may never discover; but has provided a *festinum remedium* for me by way of dis-

tress; and this distress is more privileged than others, for it may be taken in the night-time, which other distresses cannot; because, otherwise, the cattle might escape, and the goods be removed, and so the party injured remain without remedy.

Many and grievous were the extortions and oppressions of the ancient English lords in their taking distresses, during the troublesome reign of Henry the Third, for the remedying which many wise regulations were made by the statute of Marlebridge and others. For they not only distrained in a most unreasonable manner for the smallest duties, but distrained where nothing was due; and frequently even out of their fees; and to deprive the parties injured of legal remedy, drove them into another county, or inclosed them in a castle, or would not suffer their bailiffs to permit a replevin*.

Since I am on this head of distresses, it will be proper to make a few observations, *what* may be legally distrained, *when*, and *where*, and *how* a distress is to be demeaned, and what remedy the person wrongfully distrained hath to recover his property.

First then, nothing can be distrained but moveables, and such as may be restored in the same plight. For the distress is in the nature of a pledge, to be restored on due satisfaction made; therefore nothing fixed to the freehold is distrainable, as doors, windows, furnaces, &c. for these being affixed thereto, are part of the freehold, and cannot be separated thence without damage. Therefore, a smith's anvil, though not actually fixed, or a millstone removed in order to be

*Madox, Antiq. of the Excheq. chap. 13. The Statutes at Marlebridge, ap. Ruffhead, vol. 1. p. 30.

picked, are not subject to distress; for the one is, in law, still part of the shop, as the other is of the mill. Hence, likewise, money is not distrainable, unless it be in a bag; because, otherwise, it cannot be known, so as to return it in the same plight. For the same reason, by the old law, corn in sheaves, or in stacks, or in a barn, or hay in cocks, or in a loft, could not, for fear of damage in removing. That, however, hath been since altered by statute, but corn or hay on a cart could be distrained by the old law; for they being, in such a case, found in a situation fit for removal, might be transported from place to place without any probable danger of damage or diminution.

Secondly, The instruments of a man's livelihood, as the tools of a tradesman, the books of a scholar, the plough-cattle of a ploughman, &c. cannot be distrained where any other distress is to be found; and this for the particular safety and benefit of individuals. But this holds not in the case of *damage feasant;* for there the identical thing that did the trespass, and that only, must answer for it.

Thirdly, Things sent to public places of trade are privileged, for the public benefit of the realm, as cattle in a market, corn sent to a mill, cloth in a taylor's shop, yarn in a weaver's house. For it would put a total stop to commerce if these were answerable for the rents of such places.

Fourthly, What is in the custody of law is not distrainable, for it would be an absurdity that a man should have a right by law, to take things out of the law itself, such as goods already distrained, or goods taken in execution, or seized by process at the suit of the king.

Fifthly, Things in manual possession of another, are for the time, privileged, as an ax in a man's hand, or the horse I ride on. But for the damage feasant, as I said before, every thing is distrainable; for the thing itself which did the damage, is the pledge of the satisfaction, and the only one.

Next let us see *how* and *where* they may be taken. The distress, then, should not be excessive, as an ox should not be taken for twelve pence, where other sufficient distress might be had, or two sheep where one was sufficient; but for damage feasant, though ever so little, the whole may be taken; and likewise for homage, fealty, or the wages of members in parliament. As the interest of the whole community is concerned in these, no distress can be excessive. No distress can be taken in the king's highway, for it is privileged for the public use of the nation. Neither can any distress be taken by night, unless for damage feasant; for as no tender of rent, or other duty, can be made, or acceptance enforced but in the day-time, perhaps the tenant may, in such case, be provided, and ready to tender his duties the succeeding morning, and thereby save his chattels. Lastly, by the common law, no man could distrain out of his fee, unless when coming to distrain he had the view of them, and they were driven off to prevent him. But this hath been altered by statute, and now a landlord may follow his tenant's cattle, if conveyed by his lessee off the land, and distrain them within twenty days.

As to the *manner* of demeaning or managing the distress, it is the duty of the distrainor to carry them to a pound, that they may be in the custody of the

law. *Pounds* are of two kinds, *overt*, or *covert*; the one for living cattle, the other for other goods that might take damage by the weather. The reason why living cattle should regularly be put into a pound overt, is, that as they are but a pledge, from which, in itself, the taker is to receive no benefit; and as the proprietor, therefore, must be at the sole expence of feeding them, he should have the freest access to them for that purpose; and, in such case, if they perish, the loss is his; but if they be put into a covert pound, there, because the owner cannot have access, the taker is to feed them, and answer for them at his peril.

In ancient times, the lords used to drive the distresses into foreign counties, whereby the tenants knew not where to resort to feed their beasts. This was forbidden by Marlebridge, cap. 4. However, that act received this construction, that if a manor lay in two counties, and its pound in one of them, the lord might distrain in the other county, and impound them in his manor pound; because the tenant, by attending the manor court, was presumed to know every thing transacted in the manor. But now, by later acts, no distress of cattle shall be impounded out of the hundred, or barony where taken, except in a pound overt, in the same county, within three miles of the place; nor shall distresses be divided, and impounded in several places. Dead chattels must be impounded likewise within three miles, and that in a pound covert, otherwise the taker is answerable for them, if damaged or stolen.

As to the *remedy* for taking an unjust distress, the tenant might, if there was nothing due, rescue them

before they were put in pound, and justify it; but when once impounded, they were in the custody of the law, and must be delivered by law. Or if there was any thing due, he might, before they were impounded, make a tender of satisfaction; which, though the caption was just, rendered the detention unlawful; and therefore if the beasts, after such tender, were put in pound, and died there, the taker was answerable.

When the goods were once impounded, the remedy was by *replevin*, which is a justicial writ out of Chancery, directed to the sheriff, who is judge in this case, complaining of the unjust taking and detention, and commanding the sheriff to deliver them back to the owner, upon security given to make out the injustice of the taking or detention, or else to return the goods and chattels.

But this method of replevin, by writ out of Chancery, was very inconvenient to the remote parts of the kingdom; as the owner might be put to extraordinary expence and trouble, in maintaining his cattle for a long time. Hence it was provided, by the statute of Marlebridge, cap. 21. *Quod si Averia alicujus capiantur, & injuste detineantur, vicecomes post querimoniam sibi factam, ea sine impedimento vel contradictione ejus qui dicta Averia ceperit, deliberare possit**.

These empowered the sheriff to make replevins without writ, upon the plaint of the plaintiff in replevin; and this he could do out of his county court, because, as that was held only from month to month,

* Ruffhead, vol. 1. p. 37.

were it otherwise, the delay might be as great as in the case of a writ of replevin; but then the sheriff, in order to lay the foundation of the suit, must enter the plaint the next county court, that it may appear on the rolls thereof.

The sheriff's duty then was, in the first place, to take sufficient security *ad prosequendum*, that is, that the plaintiff should make out, in due course of law, the justice of his writ or plaint, that is, that the cattle or goods were either taken, or detained unjustly. He was also to take security *de retorno habendo*, that is, in case he failed, that he would return the same distress, that it might be delivered to the taker; and this is by the statute of West. 2; and he generally, likewise, took security to indemnify himself from any action that might be brought against him. And then it was his duty immediately to deliver the distress to the plaintiff in replevin.

Then it lies on the taker or defendant in replevin to *avow*, that is, to set forth the reasons of his caption, to which the plaintiff replies; and so the justice of the cause comes into question, to be legally determined. Thus much is sufficient, at the present, to shew the remedy the lord hath for his services, by virtue of his seignory, and how his tenant is to defend himself if unjustly distressed*.

I might here treat of another fruit of the lord's seignory, which is the *right of escheat*, or the lands falling back to the lord, either for the *delictum* of the tenant, or the failure of blood; but as, to understand this last properly, we must know who are inheritable,

* Glanvil, lib. 9. c. 8. lib. 10. c. 3. lib. 11. c. 4.

it will be more proper to defer it till after we have treated of *inheritances*.

LECTURE XI.

The manner in which estates for life came to be enlarged into descendible estates....The nature of reliefs....Feudal oppressions....The admission of allodial lands into the feudal policy....The extension of the feudal system in France.

THE feudal lands having been changed by degrees from tenancies for years into permanent grants for life, partly by the necessities, and partly by the favor of the lords, the matter did not stop here; but, to the advantage of the vassals, their rights were continually gaining ground, and insensibly extending themselves, to a durable continuance in the same family. To this, undoubtedly, the number of allodial estates, which were estates of inheritance in the hands of the Romans, greatly contributed. For it is not to be imagined that it could be an agreeable spectacle to the conquerors, when once they were settled, and secured in the possession of the country, to behold their posterity in a more precarious situation, with regard to property, than the vanquished were. It is true, as by their constitution the lord was obliged to provide every gentleman, that is, every one of their nation, unless he proved unworthy, with a benefice, there was no danger of their issue not being supplied, in some degree or other. But this did not satisfy them†.

† Houard, Anciennes loix des François conservees dans les coutumes Angloises, tom. 1. p. 32. et seq. Craig, lib. 1. dieg. 4.

Their roving manner of life being antiquated, and the practice of removing them from place to place every year being superseded by gifts for life, the possessors, by habitude, became fond of their dwellings, and no longer contented with bare necessaries, studied to render their situation commodious and agreeable. They built houses of strength and convenience, and by their socage, tenants, and villains, planted and improved their lands. And now it began to be thought severe, that the benefit of their improvements, and the fruit of their and their dependants' toil and labor, should go to strangers, or even to the lord himself. For before this time it had began, and was now grown into a common practice, for the lords, when they gave an estate for life, not to content themselves merely with future service, but to exact, at the time of their investiture, an *honorary fine* from the tenant; and this, being but moderate, was generally complied with, in order to gain a permanent estate. The interest of the state, which was concerned in the improvement of particulars, required also a preference of the descendants of those that made them. It is no wonder, therefore, that it grew to be a maxim, and universal opinion among these people, that the not continuing the son in the possession of his deceased father, though it was in the lord's power to remove him, was a great hardship, and an unworthy act in the lord†.

With these general sentiments, the lords, for their own interest, were obliged to comply, and especially the kings; who, by the frequent divisions of the

† Bracton, lib. 2. c. 36. Hume, append. 2. Du Cange, voc. relevium. Spelman, voc. relevamen. Reliq. Spel. p. 32. 33.

monarchy in France, had competitors to guard against; and were, therefore, enforced to attach their vassals to them in the strongest manner, by complying with their inclinations. The sons, therefore, or one of them, generally succeeded; not in virtue of any inherent right, but by a new gift, through the favor of the lord. For, upon the death of his vassal, the estate being expired, the lord took possession, and, upon receiving a fine, made a new grant, by investiture, as of a new estate, to such an one of the sons as he chose; or he divided it among them at his pleasure. These fines for continuing the fiefs in the same family were called *relevia* or *reliefs*, from the Latin word *relevare*, which signified a second lightening, or removing the hand of the lord, who had seized the benefice upon its vacancy, by the death of the former possessor. Hence the son had no right to continue his father's possession. He was obliged to petition for a new investiture, and to tender his relief, and himself ready to take the oath of fealty. These reliefs were originally paid in arms, being the most valuable property these military people had, and afterwards were converted into money. The *quantum* was originally at the lord's will; but his own interest, from the motives already hinted, commonly prevented him from being exorbitant. This preference to a succession being at first a matter of favor, not of right, some vassals, by degrees, obtained of their lord, in their investitures, an absolute right of succession to their sons; which bound the lord and his heir; and that in these two different manners. It was either by a grant to the vassal, and one or more of his sons by name; and then those omitted were excluded; or *to him and his sons* gen-

erally; and then, by the feudal law abroad, they were all admitted to enjoy in equal portions, in imitation of the Roman law, which admits all the children in that manner.

But the words of the grant were not extended, by a favorable construction, to take in grandsons by the name of sons, for the following reason. When a grant was made to a man and one or more of his sons by name, the sons were originally, at the time of the investiture, capable, or supposed capable, by the lord's admission, of doing the services of the feud; and their ability and merit was in the contemplation of the grantor, and part of the consideration of the grant; and where it was given to a man and his sons generally, the law presumed the same thing, the same capacity in them, the same intention in the grantor. But in the case of grandfather and grandson, the law could not presume so, it being contrary to the ordinary course of nature, that both should, at the time of investiture, be capable of doing the services in person; and therefore the grandsons, unless specially provided for, were excluded†.

Thus a right of succession for one step was gained by the express provision of the parties, in particular cases. But as the lord, where he continued the succession out of favor, entered into the lands, and parted not with them without payment of his relief by the son, it was reasonable in this case, where he positively bound himself, that these advantages should be reserved to him. Therefore the heir could not enter, but was obliged to petition his lord *humiliter*

† Fleta, lib. 6. c. 77. Feud. lib. 1. tit. 1. Dalrymple on feudal property, ch. 5. Madox, antiq. of the Exchequer, ch. 10. § 4.

and *devote*, and to offer his fealty and relief; and the interest of the lord and of the state requiring the place of the deceased vassal to be speedily filled up, a year's and a day's time was allowed for this application; within which space, if the heir did not apply, unless prevented by inevitable necessity, he forfeited his right of succession, and the lord was at liberty to dispose of it to a stranger.

Reliefs, however, being, in their original creation, arbitrary, it should seem to be in the power of the lord, where the quantity was not specified in the tenor of the investiture, to defeat his own grant, by demanding, under that name, more than the value of the land, or otherwise grievously to distress his tenant. This, in England particularly, occasioned many struggles. It appears from the laws of William the Conqueror, that, in those times, the reliefs were fixed according to the different ranks of the persons, and paid in horses and armor, in imitation of heriots in the Saxon times; but his avaricious and tyrannical son William Rufus laid claim to, and exacted arbitrary reliefs, to the great discontent of all, and to the impoverishment of many of his subjects†. This was redressed in Henry the First's charter, where the first chapter says, *Si quis baronum, comitum, sive aliorum qui de me tenent mortuus fuerit, heres suus non redimet terram suam sicut faciebat tempore fratris mei, sed legitima, & certa relevatione relevabit eam, similiter & homines baronum meorum, legitima, & certa relevatione relevabunt terras suas de dominis suis*‡. Henry the First, however, was a man little inclined to keep any engagements with his people

† Wright on tenures, p. 95. 96.

‡ L L. Hen. 1. c. 1.

that he could free himself from; and therefore reliefs went on in an arbitrary way, for the most part, under him, though not in so oppressive and extorting a manner as his brother William had used. For in his grandson Henry the Second's reign, in whose time the feudal payments became generally converted into money, we find, from Glanville, that the relief of a knight's fee, indeed, was reduced to a certainty, but that of a noble fee was not. *Dicitur autem rationabile relevium alicujus, juxta consuetudinem regni, de feodo unius militis, centum solidos;.... de baroniis vero nihil certum statutum est, quia juxta voluntatem & misericordiam domini regis solent baroniæ capitales de releviis suis domino regi satisfacere*||.

It seems a little odd, that the lower military people had got such an advantage above the great and powerful lords; but this may be accounted for from the number of the knights, who made the strength of the kingdom, and were not to be disobliged; and also from the precarious situation many of the great lords were in, who had been attached to the cause of Stephen. However, the wisdom and moderation of this great prince was such, that we find no complaints on this head, during his reign, or that of his son Richard; but when John ascended the throne, a prince who hated, and was hated by his nobles, the old oppressions were renewed, and aggravated to such a degree, that the remedying thereof is the first article of temporal concern in Magna Charta†.

There it is provided, *Si quis comitum, vel baronum nostrorum, sive aliorum tenentium de nobis in capite*

||Lib. 9. c. 4.

†Madox, Antiq. of the Exchequer, chap. x.

per servitium militare, mortuus fuerit, & cum decesserit, heres ejus plenæ ætatis fuerit & relevium nobis debeat, habeat hereditamentum suum per antiquum relevium; scilicet, heres, vel heredes comitis de comitatu integro per centum libras, heres vel heredes baronis de baronia integra per centum marcas; heres vel heredes militis de feodo militis integra per centum solidos ad plus: Et qui minus habuerit minus det, secundum antiquam consuetudinem feodorum‡. And now were all reliefs reduced to a certain sum of money, namely, the fourth part of what was then reckoned the value of the inheritance; for a knight's fee was then reckoned at twenty pounds, a barony at four hundred marks, and an earldom at four hundred pounds per annum. And by the gradual sinking of the value of money, and the rising of lands, these payments continuing the same, came in a few centuries to be not the twentieth part of the value. We see by the words *per antiquum relevium, & secundum antiquam consuetudinem feodorum*, how careful the lords were to have this certainty of relief acknowledged as their ancient right, and not to accept it as a concession from the crown. When the military lords began, in imitation of the estates they themselves had, to grant inheritances to their socage tenants, they likewise exacted, in the nature of a relief, from every new possessor a year's value; or, in other words, the rent of the first year was doubled. For a year's value was what was, in France, at the beginning, paid for military tenures, by the name of *rachat*, or *repurchase*, answering to our relief, until at length they were reduced to a certainty in money; and, consequently, from the same causes as in England, though

‡Ruffhead, vol. i. p. 2.

remaining nominally the same, they sunk to be very inconsiderable‖.

Estates of succession, as I observed, arose first from private grants, and that for one generation only; but they were continually extending to further lengths, and increasing in number; insomuch that, fiefs falling vacant much seldomer than before, the king had it not in his power to gratify his deserving soldiers so frequently as he should, and the crown was consequently enfeebled. This then started the notion of such grants being good only during the life of the king or lord who made them, and not binding on his successors. Upon this plan, Brunechild, in her regency, during the minority of her infant son, attempted to revoke them, and actually did revoke several; which at length raised that flame, and caused that revolution in which her son and herself miserably perished. What shews the violent indignation her venturing on this step occasioned, was the horrid manner of her death, that of being torn asunder by four wild horses. Clothair the Second, who succeeded, was wise enough by law to confirm these estates; and then, namely about the year 613, the former doubt was removed, and all these estates of inheritance confirmed to continue against the successor, according to the terms of the original investiture. New grants were continually made, and for more generations than had been formerly practised. But yet this rule of descent was not general; but all grants, unless heirs were specially named, were but for life; as it is in our law, in which a *feofment to a man forever*, is but an estate for life for want of words of inheritance†.

‖Bracton, lib. 2. fol. 86.

†Montesquieu, l'Esprit de Loix, liv. 31. chap. 1.

What greatly contributed to the extending these grants to indefinite generations, was the inclination that now seized the Romans and Gauls who held allodial lands to be admitted into the feudal policy, by becoming vassals to the king. They had long lain under very humiliating distinctions. They were no members of the state. The loss of their lives, and other injuries, were compensated only by half the satisfaction to a Frank. For neglect, or contumacy, when called into the king's courts, they were reputed guilty, and forfeited their estates; whereas a Frank was only imprisoned to oblige him to answer. When accused of the lightest crimes, they were put to the ordeal; whereas the Franks were only subjected thereto in case of murder. And many other were the distinctions between the allodial and feudal tenants. No wonder then the former were very desirous of enrolling themselves among the conquerors, which when they had at length obtained, their liberty was effected, by their giving their allodial lands, or a part of them, to the king, and receiving them back, subject to the feudal rules. Now were they immediate vassals of the king, and, as such, became Franks to all intents and purposes. But these people were not so foolish, nor could it be expected from them, to part with absolute inheritances, and take back only an estate for life. They insisted upon grants for a perpetuity, at least for as long as the issue male of the person resigning lasted. When once these donations were become common, we may be assured the Franks were very ready to follow the example, and to take all advantages either of the favor, or the weakness of their kings; and to such a number did these inheri-

tances increase, that, about the year 730, the kingdom was near being lost to the Saracens, for want of a sufficient number of beneficiary or life-estates, to encourage the soldiery†.

At the time the kings of France were merely nominal, and the whole administration in the hands of the *maires du palais*, of whom the second, who had obtained this unlimited authority, Charles Martel, was so happy as to save the kingdom from those African invaders in a battle near Tours, wherein they were routed with a slaughter almost incredible: It remained to reward the victorious soldiers, who were at least as much animated to their exploits by his previous promises, as by their affection to the ancient constitution of the state, which was now in truth destroyed, the kings of the royal race being mere phantoms, whose names he and his father had made use of at their pleasure. But this family had not acquired sufficient weight and authority to act as masters. The fund of lands, out of which benefices had been formerly given, was almost exhausted, and the major part of the lands that were not still allodial, was alienated either in perpetuity to the church, as atonements for the vices of the former kings, or what was near a perpetuity to the lords, for many descents. These last he could not despoil. They were too firmly established by custom and law; and he and all his predecessors had paved their way to greatness, by supporting these hereditary grants at the expense of the crown. Necessity therefore obliged him to make

† St. Amand on the legislative power of England, p. 27. Montesquieu, l'Esprit des loix, liv. 31. ch. 8. Dr. Robertson's Charles V. vol. 1. p. 222.

free with the lands of the church; for which, in their visions, they lodged him in a chamber, the very lowest in hell. Of these lands the greatest part he converted into benefices of the ancient kind, for life only; and by means of the number of those new ones, added to the old ones, that were in the same state, some kind of a balance was formed; which for a time supported the government, and checked the growth of inheritances. But it is remarkable, that, of those church lands, several he gave as allodial ones. I will not pretend to say, that, in this distinction, he considered the ancient nature of the lands of the church, some of which came from feudal, others from allodial proprietors. It seems rather probable, as the allodial estates were greatly decreased, by being turned into fiefs of inheritance, he was inclinable to form a kind of equality between the feudal tenants, the beneficiaries, and the allodians; that, by managing them, he might advance his family to the title, as well as power of royalty; which we find was soon afterwards accomplished by his son Pepin†.

The policy of Pepin and his son Charlemagne corresponded with Charles Martel's views. The former allowed the continuance of inheritances according to the original provision in the creation, but grew much fonder of the beneficiary estates, and Charlemagne made several laws to prevent his beneficiaries from converting by any art their interests into inheritances. In his time, a great majority of estates were benefices; but this I presume is not to be understood of France particularly, where, from the detail before

† Mably, observations sur l'histoire de la France, tom. 1. liv. 1. ch. 5. and 6. Montesq. l'Esprit des loix, liv. 31. c. 9.

mentioned, it could scarce be, but of his whole empire. For in his acquisitions, and especially in Germany, where such a practice was agreeble to the ancient customs of the natives, such a regulation was conformable to the sound policy of his father and grandfather; by which they endeavoured to restore the splendor of the old French monarchy, I mean with exception to the large gifts he gave to the church on the borders of the infidels, in atonement for his grandfather's sacrilege, and in hopes of converting those barbarians, and thereby civilizing them, and making them good subjects.

But the successors of Charlemagne had neither the power nor the understanding of their ancestors. No wonder then, that, under them, the general inclination of the subjects to change their benefices into fiefs gained ground. The division of the empire, and frequent wars between the brothers, weakened the royal authority, and strengthened their vassals; who, at the times of their kings distress, were rather to be entreated than commanded. In the time, therefore, of his grandsons, we find laws, that, conforming to the inclinations of the vassals, did in time put an end to beneficiary estates, holden from the king; opened the gate to *subinfeudations*, and all its extensive consequences; and raised a new kind of polity never before seen in the world, the *feudal* one, such as it reigned about the year 1050 on the continent, and was introduced into England by William the Conqueror†.

† Spelman on feuds and tenures. Mably, observations sur l'histoire de France, tom. 1. l. 2. ch. 3. 4. 5. 6. Montesquieu, l'Esprit des loix, liv. 31. ch. 28. 29. 30. 31.

I speak of the times of Charles the Bald, who reigned about 860. One of his laws gave leave, and an unlimited one, to the allodians, to submit themselves and their estates, in the nature of fiefs, to others besides the kings. Nothing could contribute more to the weakening of the royal power, and the throwing of all the weight into the baron's scale. Before they could be made Franks, only by becoming the immediate vassals of the king. This was equally for the public benefit of the state, the king, and the allodians. But when once the barrier was thrown down, in those times of confusion, the allodians were glad to gain the protection of the neighboring lords, and, under colour thereof, detached themselves from their former subjection to the counts, who were the king's officers over them.

Another law, of equal consequence, was to entitle the fee of a beneficiary, who had only an estate for life, without any express agreement for a longer continuance, to go to the son. This was extorted by the circumstances of the times, and perhaps then was thought of little consequence, as it only continued them for one generation. But the temper and general inclination of the people were not to be controuled. Those grants that had been so long as two generations in a family, it was sometimes dangerous, always invidious not to continue; and thus the successors often obtained permanent estates, when nothing less was intended at the beginning. And this was easily obtained, as the use of letters was not

Houard, anciennes loix des François, liv. 1. ch. 1. Basnage, coutume de Normandie, tom. 1. p. 146.

common among these people, and their charters were, by frequent rebellions, liable to be destroyed.

The last law I shall mention, is that declaring, that the sons of counts, who were the king's officers over the *allodianée*, and were originally for years, after for life, should succeed to their father. This put the finishing stroke to the beneficiary estates.... For though this, in appearance, was, as the former, but for one life, and conditionally; yet, from the prevailing principles, it was impossible they should not grow up into inheritances. And as all inheritances were growing feudal ones, and upon those conditions, and no others given, these counties become fiefs. The demesnes of the crown within them became the demesnes of the count, and all the allodiaries were now become his sub-vassals†.

We are come to the dawn of a strictly feudal monarchy; and to shew the gradation, I have, in this lecture, taken in a great compass of time. But before I proceed farther downwards, it will be proper to return a little back as to the order of time, and to speak of the consequences that attended the introduction of estates of inheritance. Of one of these, *reliefs*, I have already spoken in this lecture; but there are many others that must be taken notice of.

† See the authorities quoted above, and Selden's titles of honour, part 2. chap. 5.

LECTURE XII.

Consequences attending the introduction of estates of inheritance....The incident of homage....Differences in England and the Continent, with regard to the ceremonies of homage and fealty....The fine of alienation....Attornment....Warranties....Wardship in chivalry.

HAVING already, in my last lecture, taken notice of *relief*, which sprung up immediately with estates of inheritance, and was their immediate consequence, it is proper now to proceed to the other fruits of this tenure, which grew up not so soon, but in after times: and the first to be considered, as undoubtedly the next to relief, if not coeval with it, is *homage*; which, Littleton says, is the most honorable service (that is with respect to the lord, and the most humble service, that is with respect to the tenant, that a freeholder can do to his lord) as upon the introduction of estates for life, the ceremony of fealty was introduced, so was it thought reasonable, when a further step was taken, that of continuing them to heirs, that a new ceremony should be invented, distinct from the former; which being performed publicly, in the presence of the *pares curiæ*, should, in those illiterate ages, create a notoriety, that the tenant had a more durable estate than a freehold. The manner of performing homage is thus distinctly described by Littleton. When the tenant shall make homage to his lord, he shall be ungirt, (that is, unarmed) and his head uncovered, and his lord shall

sit, and the tenant shall kneel before him on both his knees, and hold his hands jointly together between the hands of his lord, and shall say, *Thus I become your man* (from which word *homo*, *homagium*, and *hominium* are derived) *from this day forward, of life and limb, and of earthly worship, and unto you shall be true and faithful, and bear your faith, for the tenements that I claim to hold of you, saving the faith that I owe to our sovereign lord the king;* and then the lord so sitting shall kiss him. These are the words of Littleton, and they are just in the case he puts of a tenant doing homage to an inferior lord, and who had no prior lord; but if he had a prior lord, or the homage was to be done to the king, there was a difference in the form; for if the tenant had a former lord, he also was to be excepted, that the new lord might have notice of the tenant's prior obligation, and that it was not in his power to do absolute personal services at all times to him. And if the homage was done to the king, who acknowledged no superior, then the exception was entirely omitted; but if to a subject, it was so absolutely necessary, that an omission of it was looked upon as an attempt against the royal dignity, and done in disherison of the crown. And accordingly we find, that Edward the First, in the sixth year of his reign, brought an action of ten thousand pounds damages, now at least in value thirty thousand pounds, against the bishop of Exeter, for taking homage of thirteen of his bishop's vassals, without the exception of the king; and, in the end, judgment was given against the bishop*.

Our ancient authors tell us, that the lands for

*Coke on Littleton, lib. 2. chap. 1.

which the homage was done ought to be specified in the doing homage; and the reason given is, *Ne in captione homagii contingat dominum, per negligentiam, decipi, vel per errorem.* But it was better to say, that it was for the benefit both of lord and tenant, and for the information of the *pares curiæ*, who were to judge in case of any controversy between them.

In England the two ceremonies of homage and fealty were kept distinct; the homage, as being for the most durable estate, was performed first, and afterwards the fealty; but, on the continent, at least in some countries, I find they were blended together, by the homage being done upon oath.

Another difference between England and the continent was, that, in England, no homage was repeated to the lord's heir, by a tenant who had himself performed it to the ancestor, but homage once from the tenant was sufficient for his life; whereas, in France, new homage by the same tenant was done on the death of the lord, as we may see plainly by many instances, in the case of the kings of England and France, for the lands the former held in the latter country. Homage was the symbol of a strict and indissoluble bond between the bloods of the lord and tenant, by which they, and the heirs of their blood, were mutually disabled from doing any thing to the prejudice of the other party. The tenant, therefore, could not alien, either by last will or by deed, in his life-time, without the previous consent of the lord. This maxim was established partly in favor of the blood of the first tenant, which was, in fact, often the consideration of the original grant, as when the lord gave lands in marriage with his daughter, or to a son

or a brother, (and even where it was not in truth so, the law presumed the blood of the first tenant was in contemplation on the strength of this maxim *fortes creantur fortibus et bonis*, and the probability that a gallant warrior would, by a proper education, qualify his son for the same profession) and partly also in favor of the lord, that he should not be obliged to receive as his tenant, a person that was inexpert in war; or that, if qualified, was, perhaps, an enemy to the lord, or that was previously vassal and bound to another lord who was an enemy. For in those troublesome times, the power of the crown of France, where these rules began, being greatly diminished, every lordship made a little kind of state in itself, frequently at open war; and when not so, at least in a state of suspicious peace with its neighbors; and from this state of things it happened that the word *feud* has come in our common language, to signify a mortal quarrel, as being almost inseparable from the greater, or even lesser fiefs*.

In those times, the lord, when things grew into a more settled state, took advantage of this maxim, that the tenant should not alien without licence, and the tenants readily acquiesced, under the subsistence of the rule, as it permitted them, in their turn, to exact a fine from their under tenants, or the alienees of such in all cases of subalienation; by which means this fine at length became an established fruit of tenure. In England, however, it ceased in the case of lords that were subjects from the time of the statute called *Quia emptores terrarum*, which gave every

*Houard, anciennes loix des Francois, liv. 2. ch. 1....Du Cange, voc. Hominium. Spelman, voc. Homagium.

person a free liberty to sell his lands: but the king not being named in that statute, according to the well-known legal maxim, was not bound thereby; and of course was paid fines for alienation, or by subsequent statutes a commutation for such fines by his military tenants *in capite*, to the time of the Restoration, when these tenures were entirely abolished.... On the other hand, the lord was not permitted to alien, even with the consent of his superior, without the consent also of his tenant, and that for a similar reason. For if he, the lord, might so do, he might subject his tenant to one who was the tenant's mortal enemy, and perhaps for no other reason than for serving his former lord faithfully against the new one.

This last maxim once established, introduced the practice of tenants *attorning* to their lord's grants of the seignory. *Attornment* is an act of notoriety, originally performed in the presence of the *pares curiæ*, signifying the tenant's consent, and turning over from his former lord to the new one, and the putting him, the new one, in the seizin of his services.... This, at first, was merely voluntary in the tenant; but when, in England, free alienations were allowed by the aforesaid act, it was not thought reasonable that it should be in the tenant's power to defeat his lord's grant, by refusing to attorn. He was therefore obliged, by an action called *Quid juris clamat*, to appear, and to shew forth what title he had in the said lands, and whether he had any sufficient cause why he should not attorn to the grantee; and if he could

*Wright on tenures, p. 154. et seq. Dalrymple on feudal property, chap. 2. § 2. Millar on the distinction of ranks in society, second edit. p. 215.

not shew any, he was obliged by the judgment of the court to attorn*.

Another effect of this homage was *warranty*, which is the obligation on the lord to defend his tenant in the lands holden of him; or, if he cannot, to give him a recompence of equal value in other lands, our law went no farther; but the feudal law, if the warrantor had no lands to give in exchange, obliged him to pay the value in money. *Warranty* is derived from the word *war*, because, in those real actions, the trial was of old by combat. This obligation, indeed subsided, as I have already hinted, long before the introduction of hereditary estates; but when these hereditary estates became common, and all the military tenures were of this sort, and estates for lives and years were only, or for the most part socage, these last had no warranty annexed to them by law, but only by special agreement; and the warranty I am now speaking of was confined to inheritances, and of those only to such as were held by homage *aincestrel*, that is, where the tenant and his ancestors had, from time immemorial, done homage to the lord and his ancestors. Here, on account of the continued connection between the blood of both families, the law obliged the lord and his heirs to warrant the lands to the tenant and his heirs†.

The manner of taking advantage of this obligation of the lords by voucher, which still remains in our law, (the other method by distuse being antiquated) was shortly thus: When the tenant in possession is impleaded for the lands by a stranger, who claims

*Wright on tenures, p. 172.

†Coke on Littleton, lib. 3. chap. 13.

them as his inheritance, he, the tenant appears, defends his right, and *vouches*, that is, calls in his lord to warrant the lands to him. If the lord appears gratis, and enters into the warranty, as he ought, if he is bound to warranty, the tenant hath no more to do in the defence of the suit. It is the lord's business. Against him the stranger declares, and prosecutes the suit. He defends, and it is found against him, either by legal trial, or default, for want of appearing; and the judgment the court gives is, that the demandant or stranger shall recover the lands demanded against the tenant, and that the tenant shall recover lands of equal value from the lord, or voucher, as he is termed, because he is *vocatus*, or called in to take upon himself the defence. If the lord, who is to warrant, doth not appear, he is summoned till he does; or if he appears, and will not enter gratis into the warranty, the tenant is to shew how the person he calls in is bound to warrant; which must be either by homage auncestrel, or by his, or his ancestors express covenant, as I shall hereafter shew; and until this was determined, the suit of the demandant was suspended; because as yet it was uncertain who was obliged to defend the lands. So we see in the judgment of this kind there were in fact two judgments, one against the tenant who was to give up the lands, another against the lord, who was to give lands equal in value. But there might be three, or more judgments, as there might be two or more vouchers, as if there be in respect to land, A, B, and C. A, lord paramount or superior, B *mesne*, that is, tenant to A, and lord to C; and C tenant *paravaile*, that is, the actual possessor of the land. Here, if D, a stranger, brings his action against C, the tenant, who

vouches his lord B the mesne, who enters into warranty, and vouches A, the lord paramount, who enters into warranty, and fails, D recovers the lands from C, C recovers in value from B, and B recovers in value from A, and so on, if there be more vouchers.

Warranties, as I hinted before, are of two kinds, *warranties in law*, or by homage auncestrel, or by words in the deed, which the law construes to import warranty (which stood upon a feudal footing) and *warranties in deed*, that depend on a special covenant. These last were substituted in the place of the former. For as by every alienation, either of the lord or tenant, the mutual connection between the two bloods was extinguished, and warranty by homage auncestrel consequently gone (insomuch that now, by frequent alienations, there is no such thing left) the tenant would not attorn to his lord's grant when the lord aliened, nor a new tenant accept of a grant from an old tenant of his tenancy, without an express warranty, binding in the first case the new lord and his heirs; in the latter the old one and his heirs. Afterwards the making of these warranties was extended to persons between whom there was no feudal connection; as if a man aliened lands to hold of his lord. Here the grantee held of the lord of the grantor, not of the grantor; and therefore, as he had nothing to bind the lord to warranty, would insist on an express warranty from the grantor and his heirs*.

One species of these warranties, namely, that which is called *collateral warranties*, was made use of, and it

*Houard, anciennes loix des Francois, liv. 3. chap. 13. Coke, ut supra.

was the first invention that was made use of, to elude the statute of Edward the First, *De donis*, which gave birth to, or rather restored to life that ancient kind of feudal estate which we call *Fee tail*. But it must be owned this intention was both against the words and intention of that law. A judge in his grandson's Edward the Third's, reign, says, they were wise men that made this statute, and that the king that passed it was the wisest king that ever was in England, and both assertions must be allowed. The nobles who made it were wise men in their generations. For, by making effectual these gifts in tail, they secured their estates in their families free from any forfeitures, arising from their own misconduct; which before, their estates were liable to. But at the same time it was a destructive law for the nation. It put the great lords of England, who were before too powerful, in condition, by this security of the inheritances descending to the heirs, to beard and awe the crown, and it likewise discouraged industry and commerce, which then began to rear their heads in England. Perhaps the wisdom of the sagest of the kings of England, as he is universally called, may by some be doubted in this, that he consented to this act; but he was a sage king, and did wisely in consenting to it. The barons had been so oppressed in his father's reign, and their estates so often confiscated, that a mutual jealousy subsisted at that time between them and the crown. They had been restored because the crown was otherwise in danger. They were jealous likewise of Edward himself, for one or two of his actions: in short, his barons were too powerful to be refused this law, however contrary to the interest of

the crown and the lower people, and there was more to be said in its favor, it being entirely agreeable to the feudal principles, that he who received an estate to him and the heirs of his body, should not have it in his power to contravene, by any act of his, the gift of the donor. He complied therefore with a good grace; but his wisdom, if it was seen in his complying, was farther seen, and in a stronger light, in the construction his judges and their successors made of this act, that collateral warranty, without an equivalent, should be a bar. However, this was but a feeble defence against the mischiefs of entails, which every day happened, to the weakening of the public estates, and collateral warranties, were not on every occasion so easy to be got*.

At length, in Edward the Fourth's reign, under pretence of warranties, and those entirely fictitious, a method was found out, under the form of legal proceedings, to defeat estates tail, and all remainders thereon, and that in the manner following: A, who was tenant in tail, was impleaded by collusion, by a person who pretended to claim title to the lands antecedent to the estate tail, and who was, in fact, the man to whom A, by his private agreement, was to alienate it, in destruction of the estate tail. A appears, and takes defence, but vouches to warranty B, a man who has not a foot of land, nor is likely to have any: B very readily enters into the warranty; and when the day comes that he should defend the suit, makes default; in consequence whereof, the court gives judgment, that the demandant should recover the lands against A, and A's lands of equal val-

*Wright on tenures, p. 168, 169.

ue against B the vouchee, who hath none; and yet this was judged a good bar to the entail, upon the possibility that B might purchase lands equivalent, and so A, and the other persons entitled in tail, might receive satisfaction. And that is what, under the name of a common recovery, is grown to be one of the common assurances of the realm; and though, for about seventy years, the justice and conscientiousness of it was disputed, yet being constantly asserted as law by the judges, and taken notice and approved of by acts of parliament, it is the now most effectual bar to an estate tail. To speak candidly about these recoveries, as to their application to this purpose, they were notorious breaches of the statute *De donis*, under the color of legal proceedings. Yet what could be done? the law could not be repealed; for all members of parliament had their estates entailed. It could only be eluded, and both for the king and all who had not estates tail, it was necessary it should†.

Another consequence of estates becoming hereditary, and in respect of military tenures, a fruit of seignory, is *wardship*, or guardianship. For it must now frequently happen, by the death of ancestors, that estates would descend to heirs incapable to do the service, to manage their affairs, or to educate themselves. It was necessary, therefore, that the law should make provision both for the doing the services, and the benefit of the heir, until he arrived at a proper age. And the law proceeded in a different manner, as the lands were holden either by knights service or socage; tenure, in the first case, having in view principally the defence of the realm; in the

†Wright on tenures, p. 186.

second, the benefit of the heir. With respect to military tenures, the time of age was twenty-one years complete; at which time the law presumed the heir was qualified, both by skill and strength of body, to perform the part of a soldier. At this age, therefore, he was out of the ward. If his ancestor died before he had attained that age, his lord had by law the guardianship both of his lands and person till then, and took the profits of the lands to himself for his own use, being only obliged to educate and maintain the heir in a condition suitable to his rank and station. The reason of this was, that it was a principle in the feudal law, as the profits and the military duties were equivalents for each other, that he who was obliged to the duty should enjoy the profits, which, in the first instance, was the lord, he being obliged to answer the king, or other superior lord, for all the military duties comprised in his seignory.

He had the guardianship, likewise, of the heir's person; first, that, because of the bond under which he lay to the tenant and his heirs, the law had entire confidence in the care he would take of the minor; secondly, because the lord was certainly well qualified to instruct him in the art of war; and thirdly, his own interest obliged him to do this carefully, that his vassal might be enabled to perform to him the future services. But this, as to the person, is to be understood, if the minor's father was not living. For if he was, he was guardian by nature, and intitled to the custody of the person, as in the case put by Littleton, where there is a grandfather by the mother's side, tenant, by knight service, father, and mother, and son; and the mother dies, leaving the grandfather,

and then the grandfather dies, and his land descends to the son of his daughter, then a minor, the minor's father still alive; here the guardianship shall be divided. The grandfather's lord shall have the ward of the lands, and the father shall have the ward of the person of his minor son. So it is if a lord gives land in fee by military service to the son of A, by which son's dying without issue, the lands descend to his brother, a minor. Here A, the father, shall have the custody of the body, and the lord of the lands. There was another case, likewise, wherein the guardianship, I cannot say was divided,* but where the wardship of the person was extinct. Anciently, although twenty-one years was the regular time, yet, if the minor was knighted by the king, and thereby adjudged capable of service in person, the guardianship ceased. For here, the legal presumption of unfitness was refused by a positive act of the king to the contrary. But the lords obtained an act of parliament, that, notwithstanding such knighthood in minority by the king, the lords should retain the lands of the minor so knighted, till he was twenty-one years of age; and so, after this act, the wardship of the lands continued, though that of the person, who was by the king's act declared *sui juris*, was gone*.

The term of twenty-one years, which I have mentioned was confined, as may appear by what I said concerning it, to heirs minor, that were males; but, with respect to heirs female, minors, as almost all of our fiefs soon after the conquest were feminine feuds, as the lawyers on the continent call them,

*Fortescue de laud. leg. Angliæ, cap. 14. Glanvil, lib. 2. ch. 9. Spel. reliq. p. 25. 26. Du Cange, Voc. Warda.

that is, descendible to females in the next degree, if males in that degree failed, the limitation of minority was different. In these fiefs it was impossible the woman herself should do personal service: She was, therefore, allowed a substitute; but in time of minority, as she could not appoint a proper one, the lord who was bound to perform the service to his superior, had the lands in the same manner as in case of an heir male. However, there was no reason that the minority of a woman in wardship should continue so long as that of a man, namely, to twenty-one years; for as the law of God declared that man and wife should be one flesh; so the canon law, and ours in consequence, have decreed, that, in law, the man and wife are one person, and that the husband in all respects is bound to perform the obligations she lies under. Hence, in case of a female heir, the term of the lord's guardianship was, by the common law, limited to fourteen years; by which time it was presumed she might have a husband capable, and obliged to do the duty for her. But this age of fourteen years was, in a particular case, extended, by act of parliament, to two years farther. However, as the reason of that depends on the lord's right to the marriage of the heiress, it will be better to defer speaking thereof, until we come to that head.

It remains to be mentioned, what was the nature of this interest the lord had in the estate of his minor tenant, by virtue of the feudal institutions, and so contrary to the general and the original tenure of them. For simply, the lord had only the propriety, and in consequence the right of reversion or escheat, with the render of the services; whilst the tenant had the pos-

session and the profits. But in this case, all these seem to be blended, particularly the right of original propriety and possession, so essentially to be distinguished in the feudal system. For the lord has not only his propriety in right of his seignory, but also the absolute possession, and permanency, or taking of the profits, and the minor heir apparently nothing. However, the law, in this case, did justice, and created in the lord a temporary interest, an estate for years, namely, for the number of years till the majority was completed, contrary to all the other feudal maxims. For the fee and inheritance of the estate remained in the minor, though he had neither possession or profits. This interest of the lord could not be called, at least with strict propriety, a tenancy for years, because, in this case, the lord possesses the tenant's lands, not the tenant. The lords had therefore no tenure, but an estate for years, created by the law; and that it was originally considered as an estate for years, or a chattel interest in lands, appears from two things. First, that in the early times, when alienations were scarce allowed, it was assignable over to another, without any licence or form. Secondly, that instead of going to the heir, in case of the lord's death, during the minority of the ward, it went to the lord's executors, as other estates for years did*.

As the lord was bound to his vassal and his heirs by the homage done to him, it certainly followed, that it was not lawful for him to do, during the wardship, any actual waste (that is, any permanent damage) to

*Craig, de feud. lib. 2. dieg. 20. Wright on tenures, p. 86. et seqq. Dalrymple on feud. property, chap. 2. § 2.

the estate of his minor ward, or to suffer any to be done by others. He was also obliged to repair and keep in condition, out of the profits of the estate, the houses and improvements thereon; yet so great was the misbehavior of the English lords, soon after the conquest, that many severe and restrictive laws were, from time to time, made in favor of the minor wards*.

In my next I shall treat of guardians in socage, reserving the article of marriage, though it appertained to military service, to a place by itself; as it was of a distinct nature, and went on its own particular ground in a great measure.

*Ruffhead's Statutes, p. 2. 3. Basnage, Coutume de Normandie, tit. des gardes.

LECTURE XIII.

Wardship in Socage....The nature and history of the incident of marriage.

HAVING, in the last lecture, given some account of wardship and guardianship in chivalry, it will be necessary to mention what provision the law made, now lands were become hereditary, for the benefit of a minor, when lands, held in socage, descended to him. In the former case, where war was the consideration, whose times and exigences were uncertain, the law was obliged, on account of the public safety, to consider the interest of the lord, who was to answer the duties to the state, in the first place, and the interest of the minor only in a secondary light. But in socage lands, which the lord had parted with for certain fixed stipulated services, to be paid at particular times, the lord had no claim to any more than them. Neither did the public interest demand a military person for the guardian of one who was not to be bred a soldier. A near relation, therefore, was the properest person to take the wardship.

But in fixing who that person should be, the feudal and the Roman civil law proceeded on different principles; the latter fixed upon the nearest relation that was inheritable to the estate, but the former entirely excluded all relations that might inherit. Thus, if the land descended on the side of the father, all re-

lations of the father were incapable, and the mother, or the next of kin of her blood, was the guardian. And this is a difference wherein the English lawyers greatly triumph over the civilians. For to give the care of a minor to one who might be his heir, is they say, *quasi agnum lupo committere ad devorandum.* But this very reason strongly proves the general wickedness and barbarity of the people, who were obliged to establish this rule at that time. Both laws were equally wise, because adapted each to the circumstances of the nations that made them. The Romans, who were a polished civilized people, among whom murders were infrequent, were not afraid to trust the person of the minor to the care of one who might be his heir; and such an one they preferred on account of the preservation of the estate, which they presumed would be taken best care of by him to whom it might descend. The northern nations, on the contrary, who were barbarians, and murderers, were obliged to sacrifice the consideration of preserving the estate, to the personal safety of the infant, and therefore committed both to one who could have no interest in the succession.

The guardian in socage differed from the guardian in chivalry in this, that he was but in the nature of a bailiff, or trustee, for the minor, to whom, at the expiration of his guardianship, he was obliged to account, upon an allowance of all his reasonable costs and charges. Another difference was, as to the *term* of the guardianship. For this guardianship expired at the ward's full age of fourteen; at which time, if he pleased, he might enter and occupy the lands himself, or choose another guardian;

for as at that age he had discretion enough to consent to marriage, so did the law suppose he had sufficient perhaps to manage his own affairs, at least to choose the properest person for that purpose†.

But put the case, Suppose that the minor doth not enter, or choose another guardian, but that the old one continues to receive the profits, what remedy shall the minor have for those received after his age of fourteen? Certain it is he cannot bring an action of account against him as guardian; for guardianship is expired; and yet the infant's discretion cannot be presumed so great, as to be perfectly acquainted with all his legal rights, and therefore his negligence shall not be imputed to him. The law in this case remedieth him by a reasonable fiction, and supposeth, though the fact hath not been so, that the minor had appointed him to receive the profits of the estate, and therefore gives an action of accounts against him, not as guardian, but as bailiff or receiver.

But suppose the next of kin neglects the guardianship, and any other person of his own head enters, and takes the profits, what remedy shall the minor have? In this case the law will not suppose him that enters to be a wrong doer, an *abator* as the law would call him, if the heir was of full age; but will rather presume his act proceeded from humanity and kindness, to supply the neglect of the proper guardian; and therefore, though he is not appointed guardian, either by the act of law or otherwise, he shall be considered as such, and the heir, after fourteen, shall have an action of account against him, and charge

†Coke on Littleton, lib. 2. ch. 5. sect. 123. Houard, anciennes loix des François, liv. 2. ch. 5.

him as guardian. So strictly was the guardian in socage accountable to his ward for the profits, that, if he married him within the age of fourteen, he was not only accountable for the money he received in consideration thereof (as it was the practice in those days to sell the marriage of wards) but if he received none, he was accountable out of his own fortune for what he might have received on that account, unless the match itself was equally, or more beneficial.

The next consequence of fiefs becoming hereditary, and which followed from the wardship, is the *marriage* of the ward by military service, which belonged to his lord, and was one of his beneficial fruits of tenure; and although this part of our law is now antiquated by the abolishing of knight-service, it is necessary, for the understanding our books, to have at least a general notion of it.

This right rose originally, on the continent, from fiefs becoming descendible to female heirs, and was grounded upon the same principle as the rule which forbad vassals to alien without their lord's consent. As every feudal kingdom, at this time, consisted of a number of principalities, under their respective lords, who were often at war with each other, the tenant could not alien without his lord, lest he might introduce an enemy into the feudal society. The like danger was there if a female heiress was permitted to marry at her own pleasure, or could be disposed of by her relations without the lord's consent. And at first, it seems, that this rule was general to a woman heiress during her whole life; but if so it was, it soon abated, and was confined to the marriage of females in wardship, and to the first marriage only. The law

of Normandy says, if a woman be in wardship, when she shall be of an age to marry, she ought to marry by the counsel and licence of her lord, and by the counsel and assent of her relations and friends, according to what the nobleness of her lineage and the value of her fief shall require. So that anciently the lord had not the absolute disposal of her, nor had he any thing to say to the marriage of males; for though he should marry an enemy, the fief was not thereby put into subjection to her, but she into the subjection of the vassal. And this rule, that the lord's consent should be had, was not intended for him to make an advantage of, but was a mere political institution for the safety of the community. Such was the law introduced into England at the conquest. However, it was but natural to expect that avaricious lords would take advantage of their negative voice, to extort money for licence, and by that, and their influence over their vassals, to arrogate the sole power to themselves. That William Rufus acted thus, we may well learn from the remedial laws of his brother and successor Henry the First; *Si quis baronum, vel hominum meorum, filiam suam nuptum tradere voluerit, sive sororem, sive neptem, sive cognatam, mecum inde loquatur; sed neque ego aliquid de suo pro hac licentia accipiam, neque ei defendam quin eam det, excepto si eam jungere velit inimico meo.* Another is, *Si mortuo barone, vel alio homine meo, filio hæres remanserit, illam dabo consilio baronum meorum*†.

Notwithstanding these laws, the mischief still

† L L. Henry 1. c. 1. Bracton, lib. 2. c. 37. sect. 6. Craig, de feud. lib. 2. Dieges. 21. Du Cange, voc. Maritagium. Glanvil, liv. 7. c. 12.

gained ground, and the lords extended their encroachments, until they not only got the absolute disposal of female, but of male heirs also. When this happened, is hard to determine precisely. That it was after Glanville, who wrote in Henry the Second's time, and before Bracton, who wrote in Henry the Third's, is plain: Mr. Wright's conjecture seems probable, that it grew up in Henry the Third's time, when the barons were very powerful, from a strained construction of Magna Charta, which says, *Hæredes maritentur absque disparagatione;* where the general word *hæredes* should have been construed to extend only to such heirs as by the former law were marriageable by their lords, namely, female ones; but both king and lords, taking advantage of the generality of the expression, claimed and usurped that of the son's also*.

However, it is rather to be presumed, that this encroachment began earlier; since, in the statute of Merton, the twentieth of Henry the Third, we find these words: *Quia maritagium ejus qui infra ætatem est* (speaking of a male) *mero jure pertinet ad dominum feudi.* From whence I rather gather the practice was earlier than Magna Charta, which was not above thirty years before, and confirmed by its interpretation. But if, in this respect, the vassals were encroached on by their lords, in another, they met with a mitigation in their favor. For the consent during the father's life, went into disuse, and every man was allowed to marry his son or daughter at his pleasure; and this with very good reason. For as the prohibition was for fear of introducing an

* Wright on tenures, p. 97.

enemy; of this there was no danger where the marriage was by the father, a vassal, bound by homage and fealty to do nothing to the prejudice of his lord. Thus was right of consent to marriage introduced first for political reasons, turned into a beneficial perquisite, and fruit of tenure, for the advantage of the lord; and notwithstanding all the laws made to regulate it, as constantly abused; so that the evils thence arising were not among the least causes for abolishing military tenures*.

The penalty for marrying without consent was originally, as all breaches of fealty were, absolute forfeiture. But the rigor of the feudal law subsiding, lighter penalties were introduced. By the sixth chapter of Merton, remedy is given to the lord, whose ward, under fourteen, has been taken away by any layman (and a later act extends it to the clergy) and married, by an action against the *raptor* or *ravisher*, as he is called, for the value of the marriage, besides imprisonment and a fine to the king. If the ward himself, after the age of consent, or fourteen, should, to defraud his lord, marry himself, he, as guilty of a breach of fealty, is more grievously punished than a stranger. For this act provides, that the lord, in that case, shall retain the lands after the full age of twenty-one, for so long a time as, out of the profits, he might receive double the value of the marriage†.

The next, the seventh chapter, is in favor of the ward, and an enforcement of that chapter of Magna Charta which forbids disparagements without inflicting any penalty. It enacts, that if the minor under

*Ruffhead's statutes, fol. p. 19.

† Ibid. p. 6.

fourteen is married by his lord to his disparagement, upon the plaint of his relations, the lord shall lose the wardship; and the profits of the lands, till full age, shall be received by the relations so complaining, and laid out for the benefit of the heir. But if the marriage was after fourteen, the age of consent, it was no forfeiture, on the maxim, *Volenti non fit injuria*. This act goes farther in favor of the minor; for it gives him a liberty of refusing any match the lord should offer him. But to prevent the lord's entirely losing the benefit of the marriage by the refractoriness of the ward, it enacts, in this case, that if he refuses a convenable marriage, the lord shall hold the lands after twenty-one to his own use, until such time as his late ward shall pay him the single value thereof.

The twenty-second chapter of Westminster the first confirms and repeats the sixth of Merton, and farther obviates a fraudulent practice of the guardians of female heirs. I observed that their wardship by law ceased at the age of fourteen, by which time they might have husbands capable of the service: but some lords, *for covetousness of the lands*, as the act expresses it, would not offer any match at all to their female wards, under the pretence of their being incapable of the services, in order to hold on the lands for an unlimited time. This act so far alters the old law, that if the heiress arrive unmarried at the age of fourteen, the lord should hold two years longer, that he may have time to look out for a proper match to tender her, within which time, if he neglects it, he loses all right to her marriage. On the other hand, if the heiress will refuse a suitable offer, the lord is empowered to retain the lands until twenty-one, and

so much longer, until he has received out of the profits satisfaction for the value.

The ravishment of wards from their lords continuing, notwithstanding the statute of Merton, the thirty-fifth of Westminster the second gave the writ called *Of ravishment of ward*, and assigned a more speedy and beneficial method of proceeding, and added to the punishments by the former act of Merton inflicted on offenders†.

But notwithstanding all these regulations concerning marriages, and the other many acts made to prevent misbehavior of lords to the lands of their wards, the source of the evil remained in the wardship itself; and the evils constantly followed, insomuch that for hundreds of years, it was one of the heaviest grievances the subject suffered. Many were the wastes done to estates; many the heirs married contrary to their inclinations, and frequently unsuitably. The grievances fell heaviest on the wards of the crown. There were always a set of needy or greedy courtiers ready, if they had favor enough to beg, or otherwise to buy at an under rate, the wardships of minor tenants, of which they were sure to make the most advantage; marrying the most opulent heirs to their own children, or relations, or extorting extravagant sums for their consent. A remarkable instance of this happened so lately as Charles the First's time, in the case of the earl, afterwards first duke of Ormond. A long suit had subsisted between the lady Preston, grand-daughter and heiress at law of Thomas earl of Ormond, and her cousin, the heir male of the family, for that part of the estate

†Coke's institutes, part 2. p. 440. Ruffhead, vol. I.

her grandfather had entailed to go with the title. At length the relations on both sides thought the best expedient to end this intricate dispute, was by uniting the young relations, who likewise had conceived a strong affection for each other; yet, although the king did highly approve thereof, did the earl of Warwick, who was grantee of the young lady's wardship, extort ten thousand pounds before he would consent to a marriage on every account so desirable.

King Henry the Eighth, finding how grievously the subject was oppressed, and how much the crown was defrauded, erected, by act of parliament, a court called the *Court of Wards*, to take proper care of minors, and to answer in a moderate manner for the profits to the king. This for some time was a considerable alleviation of the load; but in the weak reign of James the First, who was governed by his favorites Somerset and Buckingham, this court was converted into an engine for raising their families, by providing their numerous and indigent relations with the greatest heiresses, to the great discontent of the ancient nobility, who saw the most opulent fortunes suddenly raised by private gentlemen, dignified by titles for the purpose. And great were the extortions likewise for the licenses that were granted to some to marry at their pleasure. The only advantage the public reaped at this time from this right of disposal in marriage was, and it must be allowed to be a considerable one, the opportunity it gave the crown of breeding the heirs of many families in the reformed religion; and in justice, it must be owned, this was not neglected.

In the eighteenth year of this last reign, it was

moved in parliament to purchase off these heavy burthens of ward and marriage, by settling a handsome yearly revenue in lieu thereof on the crown. But the attempt did not succeed at that time, probably owing to the courtiers opposition to it, from their own interested views. In Charles the First's reign, this court was one of the great objects of complaint. At length, on the restoration, the king consented to turn all the military tenures, except grand serjeanty, into socage, in consideration of an hereditary revenue settled on him, and so all the fruits thereof ceased, and the feudal system, which had for ages, from time to time, undermined the constitution, fell to the ground, though very many of the rules of our law, founded on its principles, still retain their force*. In this kingdom the equivalent given for this abolition was the tax of hearth-money, in which, it must be owned, the king, and those who had been his military tenants, were a little too sharp for the rest of the people; for by the improvements of the kingdom, that revenue is every day increasing to the crown, and almost the whole burthen is thrown on the lower class, who before felt none of the oppression, or weight of wardship and marriage.

* 32 Hen. VIII. c. 46. 12 Car. II.

LECTURE XIV.

The rules of descent in the old feudal law in regard to the sons of the last possessor....Representation and collateral succession....Feminine feuds.

IT is now time to see how inheritances descended by the feudal law, where, in the original grant, there were no particular directions to guide the descent; for in such case the maxim of the feudal law holds, *Tenor investituræ est inspiciendus;* or, as the common law expresses it, *Conventio vincit legem.* The first rule then was, that descendants of the first acquirer, and none others, were admitted. The reason was, that his personal ability to do the duties of the fief was the motive of the grant, together with the obligation his fealty laid him under to educate his offspring to the lord's obedience, and to qualify him for his service in war. It was observed, therefore, it should go to the first purchaser's collateral relations, whom he had no power to bind by his acts, and over whose education he had no influence. I mean where it was not particularly otherwise expressed; for then the collaterals succeeded, as the merit of their blood was part of the consideration; not so properly in the right of heirs, as by way of remainder, under the lord's original grant*.

The next thing to be inquired is, since the descend-

* Craig, de feud. lib. 2. Dieges. 13. Dalrymple on feudal property, ch. 5. sect. 1.

ants alone inherited, whether all, or which only of them inherited. And here the females and their descendants, unless they were specially named, were totally excluded, not merely for their personal incapacity, but lest they should carry the fief to strangers or enemies; and therefore, where they were admitted, they were obliged to marry with the consent of the lord. The third rule is, that, unless it was otherwise stipulated, all the sons succeeded equally to the father. This was the ancient feudal law, and the law of England in the Saxon times, the relics of which remain in the gavel kind of Kent, and remained in the last century in many, if they do not still in some of the principalities of the empire. In France, during the first, and a good part of the second race, we see the kingdom divided among the sons. There are not wanting instances of the same among the English Saxons; and the Spaniards continued the practice now and then even in later ages. But the frequent wars, occasioned by these partitions, at length abolished them, and made kingdoms to be considered as indivisible inheritances. In imitation of the sovereignty, the same alteration was introduced into the great seignories, which made, at this time, the principal strength of the kingdom, and which, now the crown was become indivisible, would, if liable to partition, become so inconsiderable in power, as to be at the mercy of the king*.

The inconveniencies attending the lower military tenancies which still continuing divisible, were crumbled into very small portions, and, of course, must have fallen into indigent hands, were such, that these

*Craig de feud. lib. 2. dieges. 14.

also, for the most part, became descendible to a sole heir. But this, however, was not effected but by degrees; for in the reign of Henry the First, though a single knight's fee was not divisible, yet when a man died siezed of more than one, they were distributed among his sons as far as they went; but in his grandson's reign the general law was settled in favor of a single heir, in the same manner as it has stood ever since†.

But it remains to be inquired which of the sons, in case of an indivisible inheritance, should be this sole heir. In the ancient and unsettled times, the law made no particular provision; but, as the lord was at the head of the military society, and bound to protect it, it was left to his option to fix upon the properest person to do the duties: and an instance of the exertion of this power we have in England so late as the reign of Henry the Second, who gave the entire military lands of Geoffry de Mandeville to his son by a second ventre, to the exclusion of the eldest by a former wife, for this reason, *eo quod melior esset miles.* A trace of this still remains in the case of a peerage, descendible to heirs general, that is, male or female, falling to daughters. Here the fief being indivisible, the king may appoint the peerage to which he pleases, and until he doth so, it is not indeed extinguished, but lieth dormant, being what is called *in abeyance*, or the custody of the law. But at length this uncertainty was removed, and the eldest son being generally the best qualified, and consequently almost always

† Basnage, coutume de Normandie, tit. De partage d'heritage. L. L. Hen. 1. 70.

chosen, obtained the right, by degrees, in exclusion of his brethren, or the choice of the lord*.

But it will be inquired with respect to kingdoms, who had no superior to make the choice, how was it to be determined after they became indivisible, which of the sons was to succeed, seeing the absolute right of primogeniture was not yet established in the opinions of men. I answer, the usual practice was for the king himself, before his death, to appoint the successor; generally with the consent and approbation of his states, and sometimes merely by his own act, which was almost universally allowed, and obeyed by the people. But if no such disposition had been made, the states assembled and chose the person themselves; and these appointments generally falling on the eldest son, paved the way for lineal hereditary succession, though the case was not always so.

In France, Hugh Capet, to go no higher, in order to prevent competition, caused his son Robert to be crowned, and sworn allegiance to in his lifetime; but Robert neglecting the same precaution, Henry his younger son was chosen in preference of the elder, who was obliged to content himself with the dutchy of Burgundy. And if Henry was an usurper, so were all the succeeding kings of France for three hundred years, till that family of Burgundy failed. Henry followed his grandfather Capet's example, and so did his successors for about an hundred years, and then, the notion of the lineal succession of the eldest son being fully established, the custom of crowning the son in the father's life, was laid aside, as unnecessary.

* Dalrymple on feud. property, chap. 5. § 1. Hume, appen. 2.

In England the practice was anciently the same. William the Conqueror, though he set up a claim under Edward the Confessor's will, yet as that never appeared, a formal election by which he was chosen, extorted indeed by dread of his power, but apparently free, was his title. When pressed to declare a successor, he only signified his wish that William might succeed, but declared he would leave the people of England as free as he had found them. William accordingly was elected in prejudice of his elder brother Robert, and upon his death, occasioned by an accident, Robert was again excluded, and Henry the First, the third brother, chosen. Henry was willing to have the course of descent secured in his offspring; and for this purpose proceeded in the method that had been so successful in France, namely, by causing his son Henry to be crowned, and sworn to. But this latter dying childless in the lifetime of his father, king Henry caused his daughter Maud to be acknowledged successor, and the oath of eventual allegiance to her to be taken by his people. However, this project did not succeed. No nation of Europe had yet seen a crown on the head of a female; and Spain was the only country that had ever had a king who claimed in a female right. The majority, therefore, upon Henry's death, looked upon their oath as inconsistent with the nature of monarchy, and void, and in consequence chose Stephen, who was the son of Maud's aunt, and grandson of the Conqueror, whose whole male issue was now spent. There was, however, a large party in the kingdom who paid a greater veneration to the obligation of their oath, and adhered to Maud. Hence was this reign a continu-

ed scene of civil war, until all sides, being wearied out, by mutual consent, ratified by the states of the kingdom, Stephen was allowed king for life, and Maud's personal pretensions, as a woman, being set aside, her son Henry the Second, was declared, and sworn to, as eventual successor†.

Henry the Second followed the example of his grandfather, and had his eldest son Henry crowned; but that ungrateful prince conspiring and rebelling against him at his death, which likewise happened in the lifetime of his father, the old king fearing the like consequences, refused to crown his next son Richard; who conscious of his own ungrateful conduct, and suspecting that this refusal proceeded from partiality to John, the youngest and favorite son, stirred up those commotions and rebellions which broke his father's heart. Richard was the next heir, and did succeed, but not merely in the right of next heir; for he assumed no title but that of duke of Normandy, until he was elected and crowned. The title of John was notoriously by election, and his son Henry the Third was the first who was introduced to his subjects by the words, *Behold your king*, or words equivalent. Those few who adhered to his father, immediately swore to him; but the majority, who were disaffected, did not submit but upon terms, the restoration of the charters.

From that day the lineal succession has been established, and the crown is vested in the successor upon the death of his ancestor, and the maxim pre-

† Hale's hist. of the common law, chap. 5. Bacon's hist. and pol. discourse on the laws and government of England, part 1. chap. 45, 55, and 56.

vailed of the king's never dying; whereas before, the crown was in abeyance, till coronation, and the date of the king's reign was taken, not as now, from the death of the former monarch, but from the day that the succeeding one was crowned. Henceforth coronation became a mere ceremony, though the form of an election is still continued in it. I have been more particular in this detail, in tracing the origin of the hereditary descent of the crown, to shew how false in fact, as well as in reason, the notion is of its being founded either on divine right, or on any law of man coeval with the monarchy†.

Having laid down the rules of descent in the old feudal law, in regard to the sons of the last possessor, it will be proper next to mention how far it admitted representation, or collateral succession; for at first both were excluded. If a man had two sons, one of which died before him, leaving a son, the grandson could not succeed to his grandfather, but the uncle was sole heir. This was grounded partly on the presumption that the uncle was of more mature age, and better qualified to do the service; but this could not be the only reason, for the rule was general, and held where the grandson was of full age and capacity. We must have recourse, therefore, to a farther cause, which was also the same that, in those old times, prevented collateral descents; for if a man had two sons, by the old law, the estate was divided between them. If one of these died without issue, the brother did not succeed to the share of the deceased, but it reverted, as an escheat, to the lord. The reason of

† Id. chap. 57. See also Tyrrel's history, and Kennet's historians.

both these was, that he that claims by descent, must claim through the last possessor, and derive his right from him; and that right arose from the supposition of his being educated in the fealty of the lord, that is, by the last possessor who had sworn fealty. Therefore the grandson, being educated under the *patria potestas* of his father, who, dying before the grandfather, had never taken the oath of fealty, was excluded the succession, as not trained up by a real tenant; but the uncle was admitted to claim from the grandfather, the tenant under whom he was bred†.

This rule was of some advantage to the feudal system at that time, as it frequently prevented the too great crumbling of fiefs, when almost all of them were divisible. For the same reason a brother could not succeed to a brother, even in a paternal fief, because he was not educated by the last possessor that had done fealty: and though this seems very unreasonable, as he had been bred in the fealty of the lord, namely by the father, yet this rule continued for ages, being greatly for the advantage of the king and the great lords, in regard to their escheats; as every failure of a lineal descent occasioned them to happen. Neither was it thought severe in those early ages by the tenants. As all benefices were originally for life, it was a great advantage to have them made descendible even under these strict limitations‡.

At length the necessity of Charlemagne's grandsons, who had parted the empire, and were in eternal broils, extorted from them, in France, a grant of the

† Glanvil, lib. 7. cap. 3. Craig de feud. lib. 2. dieges. 15. Dalrymple on feudal property, chap. 5. § 2.

‡ Lib. Feud. 2. tit. 12.

grandson's succeeding in his father's share, by way of representation, in imitation of the civil law, and also of brothers succeeding to brothers in a paternal fief, but not in a new one. And about an hundred and fifty years the like necessity of the emperor Conrad, who was embroiled with the Pope, procured the same law for Germany and Italy‖.

The extension of the right of collateral succession beyond brothers grew up by degrees, not from any positive law. It was first extended to uncles and cousin-germans, provided it was a fief descended from the grandfather; afterwards to any the next cousin, to the seventh degree, descended from the first purchaser; and at last to any, however remote, who could prove their descent from the first purchaser. This was the rule in ancient inheritances; but with respect to new ones, lately acquired, there grew up a practice of granting them *as ancient* ones; *feudum novum, ut antiquum, datum.* Here the fief, though really new, was, by means of this grant, supposed to proceed from some indefinitely remote ancestor, at any distance; and therefore any one, who could prove himself descended from a common ancestor of the last possessor, was admissible, and he that was nearest by the rules of succession was preferred. In this case, therefore, the old rule of requiring a proof, that the person claiming as heir was a descendant of the body of any ancestor of the last possessor, would be absurd, as defeating the tenure of investiture. Any ancestor *pro re nata* might be supposed the first purchaser, to support the intention of the donor, in his directing it to be considered as an ancient fief, al-

‖ Lindenbrogius, cod. leg. antiq. p. 679.

though in fact modern. So in this case, if the fief was masculine, any male relation, descended from male blood entirely, was inheritable, even up to Adam, I mean, if he could prove his descent; but females, and their descendants were excluded†.

If it was descendible to females, either by the particular terms of the grant, or by the general law of the country, then, as it was supposed to descend from any lineal ancestor *pro re nata*, that ancestor might be a female, and the descendants of females, and they themselves might be admissible. The rule then was, to establish in this case of a fictitious descent, the same regulations as in the case of a real one. But here the root from whence the right of descent was to spring, was inverted; for as there was no real ancestor, an original purchaser, the person last seized, that is possessed of the fee, was the person to be considered. As in the old and common case of inheritances descending, the reckoning was downwards from the first acquirer; in case of collaterals, when they were admitted, you begin to reckon lineally upwards, and at every step inquire for collaterals descended from that lineal ancestor you are upon at the time‡.

A man purchases *feudum novum, ut antiquum*, and dies without heirs of his body. This feud is, by the constitution of it, presumed to have descended from some of his ancestors. To find out who is that ancestor, it was likely to have descended from, you must look at the law of descents: the father, in the first place, is supposed the person. His children, that

† Dalrymple on feud. property, chap. 5.

‡ Craig de feud. lib. 2. dieges. 14.

is, the brothers or sisters, or their descendants, in the first place; if none of them, the grandfather by the father is supposed the person; then the grandfather's descendants. The uncles and aunts by the father, and their descendants, succeed in the second place. If none of them, then the great grandfather's by the grandfather and father descendants, the great uncles and aunts, and their posterity; and if there are none of them, you still go a step higher in the male line, till you can trace it no farther. But now you begin to invert the rule of tracing up in the male ancestors, and so downwards, and trace up to the female ancestor of the males, as supposing the estate descended from her, or her ancestors. For instance, I have supposed the descendants of the male line have failed in the great grandfather. His wife, therefore, the great grandmother, is supposed the first purchaser; for, upon account of the probability of the inheritance coming through males, I trace up to her through the father and grandfather; her heirs, therefore, shall succeed, first, lineal, then collateral, in the same manner as if the estate had descended from a remote ancestor of hers. If none such can be found, we descend another step, namely, to the grandmother by the father, and suppose the estate to have come from her line; and then heirs, first lineal, then collateral, succeed according to their several ranks. If none of these, so that there is no kindred on the side of the father, the presumption is, that this supposed ancient feud came from the mother's family, and therefore the heirs of her male ancestors are to be traced up, and discovered in the same manner; and whenever they fail, the heir of the most remote female ancestor, all through males; and failing them, the heir of

the next most remote, and so on, until the blood of the mother is spent; and then the estate, for want of heirs, reverts to the lord, of whom it is holden.

Such is the rule of descents of new purchases granted as if they had been ancient inheritances; but this rule was, on the continent, and anciently in England, confined to such grants, and them only, wherein this clause appeared in the investiture. But in the reign of Stephen, his necessity of gaining adherents, and the same necessity of his competitor Henry the Second, occasioned so many grants of this kind to be made, some originally, and others on the surrender of old ones, that it hath since become the common law of England, that purchases, that is, new acquisitions, are descendible to any relation, however remote†.

It will be necessary to say something as to *feminine feuds*, which are a deviation from the strict principles of the ancient law, which excluded them and their descendants entirely. They first arose from the woman's being the principal consideration of the grant; as when a lord gave lands in marriage with his daughter, sister, niece, kinswoman, or any other female: here the lands being partly given in consideration of the female blood, it was reasonable they and their descendants should be inheritable. But this was still an exception to the general law, and confined to those grants wherein it was mentioned, until the number of those grants, at length prevailed to have this order of succession considered as the general law, and the succession of males remote, in exclusion of a nearer female (as in case of tail male)

† Hale, hist. com. law, chap. 9.

considered as an exception. The monarchy of France, however, and of many of the principalities of Germany, have retained the ancient feudal law, in absolutely excluding females and their descendants.

The descent of imperial crowns to females, was of a much later date, than that of lower fiefs : for here a manly capacity was looked upon as indispensibly requisite. The first step was admitting a male representative for them, a husband or a son. This began in Spain. Pelagius, who was of the blood royal, having gathered a few of the Spanish fugitives together, after the Moorish conquest, founded a petty monarchy in the mountains of Asturias. His son Favila dying without issue, the crown was given to his daughter's husband, and this continued the rule for many ages, where males failed. But where the son of such female heir was of sufficient age to mount the throne, he of course excluded both mother and father. At length, in the thirteenth century, Europe, for the first time, saw a woman solely invested with royalty, Joan the first of Naples ; for Henry the first of England's project in favor of his daughter Maud, as we have said before, had miscarried. Margaret of Denmark, Sweden and Norway, Joan the second of Sicily, and Isabella of Castile, followed in the next century. In the following century came Mary and Elizabeth in England, and many since in all parts of Europe ; so that at present the monarchies of Europe are descendible to females in general, if we except France, and several, but not all of the principalities of the empire. Bohemia and Hungary have received a queen in the person of the present empress in this present century, but so inveterate are old customs and opinions that when her faithful Hungarians

resolved to assist her to the last extremity, it was by saying, *moriamur pro rege nostro Maria Teresa*, not *pro regina*†.

† Giannone's hist. of Naples. Selden's tit. hon. part 2. chap. 9.

LECTURE XV.

The difference between allodial and feudal lands....The restrictions on the feudal law....The decay of these....The history of voluntary alienations.

ONE great and striking difference between allodial and feudal lands consisted in this, that the former entered into commerce. They were saleable or otherwise alienable, at the will of the possessor, either by act executed, and taking effect in his lifetime, or by will, to take effect after his death. They were likewise pledges to the king for the good behavior of the owner, and therefore for his crimes forfeitable against him and his heirs. They were also security to his fellow subjects for the debts he might contract; and, therefore, by following the due course of law, attachable and saleable, to satisfy the demands of a just creditor†.

In every one of these respects did fiefs, when they became descendible inheritances, differ from them. The possessor was but an usufructuary, and his power over his lands was checked and controlled by the interest others had therein. These were the lord and the persons descended from the first purchaser. The

† Boquet, le droit public de France, p. 30.---36.---Allodium, proprietas quæ a nullo recognoscitur. Tenere in allodium, id est, in plenam et absolutam proprietatem. Habet integrum ac directum dominium quale à principio de jure gentium suit distributum et distinctum. Du Moulin, de l'ancienne coûtume de Paris, art. 46.

consent of the lord was absolutely necessary to the tenant's alienation, to prevent the introduction of an enemy or unqualified person into the fief; but the consent of the lord alone was not sufficient, if there were in being any persons entitled to the succession. Thus if A. is himself the first purchaser of a fee, and hath a son, his alienation, even with the consent of the lord, would hold good only during his own life; but if he had aliened with the consent of the lord before issue had, this should be valid, and bind the issue born afterwards. For here the alienation was made by all the persons in being interested in the land, and the former contract is by their mutual act dissolved, nor is there any wrong done; for it is an absurdity to say that a person not *in rerum natura* can suffer wrong: the consent therefore of the son, or sons, if one or more of them were in being, was as necessary as the lord's in this case.

If the lands descended from B. the first purchaser, to his son A. before the introduction of collateral descent, the law was the same; but when these were admitted, it varied for the same reason. A. could not alienate with the consent of the lord and his sons, without the consent also of all the collaterals entitled, that is, all the *agnati*, or male descendants of B. for this would strip them of their right of succession. If it descended from C. the grandfather, or from any more remote ancestor, the consent also of all the male descendants of the grandfather, or that remote ancestor was required, upon the same principle. By this we see it was next to an impossibility, that an estate which had been any time in a family (so many consents were

required) could be alienated at all. However, there was allowed by that law a transfer of the fief in a particular case, even without the consent of the lord. This was called *refuting the fief;* it was a resignation of it to the person who was next in order of succession. Here was no injury done to the lord, or the *agnati*, because it went in the same manner, and to the same persons, as if the refuter was absolutely dead, *& quisque juri suo renunciare potest.* For the same reasons no testaments of lands were allowed, except the lord and all others concerned were present and consenting; which scarce ever happening, it became a maxim of the English law, that lands were not devisable by will.

Neither were the feudal lands originally forfeitable for the crimes of the possessor for any longer time than his own life, if there were persons entitled to the succession. But this rule of forfeiture was afterwards extended to the issue of the criminal: for as the right of succession depended much on the supposition the successor was educated in the fealty of the lord, this presumption ceased where the father had actually broke his oath of fealty. And at length, when the rule was established, that every person must claim through him that was last seized, and make himself heir to him, the delinquency of the predecessor became likewise a bar to collaterals.

Feudal estates also were not liable to the debts contracted by the feudatory. For if the creditor might have sold them for debt, a wide door for alienation had been opened, by means of fictitious debts, contracted by collusion between the creditor and vassal. Or even if they were honest ones, the lords and the

heirs would have been deprived of their right. Neither could the creditor attach the profits of the land during the life of the debtor; for if he could, an improvident vassal might so impoverish himself, as to be incapable of the duties of the fief.

Such and so strong were the restrictions this old law laid on the feudatory. But as times grew more settled, and the strictness of the military system abated; as commerce increased, and with it luxury, the propensity to alienation grew up, and became at length so strong, in every country, as to be irresistable.... And it is a speculation not only curious, but very useful for the students of our law, to observe and remark its progress in England*.

The first step towards voluntary alienations arose from the practice of subinfeoffing. Originally, as I observed in a former lecture, although the vassals of the king could infeoff, their vassals could not; but at the latter end of the second race in France, when the power of the crown was declined, and the great lords were in reality sovereigns, acknowledging only a nominal dependance on the king, some of them, in order to strengthen themselves, and to increase the number of their military followers, allowed this privilege not only to their immediate vassals, but to subvassals also, to an unlimited degree. And when this practice was once begun, the other lords, for their own security and grandeur, were obliged to follow the example. This practice of subinfeuding contributed much to the power of the lords, and therefore was by them encouraged. But though it was intended, at

*Dalrymple on feud. property, ch. 3. sect. 1.

first, only to extend to part of the vassal's fief, the usage of subinfeuding the whole gained ground, to the great prejudice of the heirs ; when the terms of subinfeudation were no better than those of the first grant ; and of the lords also, who thereby lost frequently their profitable fruits of tenure, their reliefs, wardships, and marriages ; which, with respect to the lords, was remedied in the reign of Edward the First, by the statute of *Quia emptores terrarum* before mentioned*.

In the mean time, free alienation was allowed in cities and boroughs ; partly because many of these were old Roman towns, and their lands and houses allodial, and because those which were not so were founded by lords on the same principles for the benefit of commerce, which could never have flourished if a debtor had not full power over his property of all kinds to satisfy his creditor ; and if the creditor, in case he was unwilling, had not power to compel him to sell for his just satisfaction. Alienations, however, of one kind were permitted, namely, the founding of monasteries, and endowing of churches. These, through the superstition of the times, were looked upon as being equally beneficial to the feudal society as subinfeudation, by engaging God in their interest ; and even if the lords and their heirs, who suffered by these grants, were willing to dispute them, they were unable to contend with the omnipotent power of the pope and the clergy ; until at length the tyranny of the first, and the avarice of the last, provoked both king and people to restrain them by the acts against Mortmain. But no other alienations were yet allowed without consent, as before mentioned†.

*Lib. 4. feud. tit. 34. Ruffhead's statutes, v. 1. p. 122.

†Gibson, cod. jur. eccles. Anglican. tit. 28.

In the reign of William Rufus a particular matter occurred, which opened a way for alienation without the lords consent, and occasioned a prodigious revolution in the landed property of Europe. This was the madness of engaging in crusades for the recovery of the Holy Land. A crazy friar returning from a pilgrimage to Palestine, where he saw the Christians maltreated, began to preach up this expedition as the most meritorious of works; and it is wonderful with what an epidemical contagion the enthusiasm spread through all ranks of people. These pilgrims, who assumed the cross, had no way of defraying the expence, but by the sale of their lands, which their lords, if disinclined, dared not to gainsay, or obstruct so pious a work. But indeed, most of them were conscientiously affected with the same madness, as may be seen by the great number of kings, princes, and lords, that beggared themselves in these fruitless enterprizes‡.

The pope and the king concurred in inflaming this superstition, but from different motives. The pope did it out of ambition and avarice. The former he satisfied by declaring himself the head of the expedition, and thereby attaching to himself and his see such multitudes of redoubted warriors by the strongest of bonds, conscientious superstition. And indeed successors in that chair afterwards made very good use of this example, by preaching up crusades against such Christian kings and princes as disobliged them. But the more immediate advantage he received, was the glutting his avarice by a proper sale of

‡Kennet's collection of historians, vol. 1. p. 116. Carte, hist. of England, vol. 1. p. 469. 555.

dispensations to such as had rashly taken the cross, and afterwards found themselves unable, or unwilling to fulfil the obligation. The reason that induced the kings of Europe to promote this spirit, I mean such of them as were not possessed with the frenzy themselves, was the hope of abasing their too great and powerful vassals, which would naturally follow from the alienation of part of their lands, to equip them for the expedition; and a desire to facilitate the partition of these great seignories among females, when the males, were so frequently and miserably slaughtered†.

So many were the alienations of this kind, and so long were they continued, that it is no wonder that the interest of the lord and the heirs began to lose ground in the opinions of the people, which proceeded so far, as that, in the other cases, the lord, on the payment of a moderate fine, either before or after, was looked upon as obliged to consent to the alienation. Let us now see how the liberty of alienation gained ground, particularly in England.

In Henry the First's time, a man was allowed to alienate his purchase, but not an estate that came by descent. This law says, *Acquisitiones suas det cui magis velit; si Bocland autem habeat, quam ei parentes sui dederint, non mittat eam extra cognationem suam**.

This liberty of alienation of purchases is not to be understood generally, but only where the purchaser had no son; if he had any, it may be a doubt whether he could alienate any part at this time. Certain it is, he could not the whole, even in Henry the Sec-

*Hume, hist. of England, vol. 1.

†LL. Hen. I. cap. 70.

ond's time. For thus Glanville lays down the law: *Si vero questum tantum habuerit, is qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet sed non totum questum, quia non potest filium suum hæredem cohæredare**.

The practice of alienating lands by descent grew up more slowly. At this time a part only was alienable, and that not freely, to all persons, or for any consideration generally; but only in particular cases, first to the church in Frankalmoigne; secondly, to one who had done services in war, or to the fief in time of peace; thirdly, for the advancement of his family, as in Frank-marriage with his daughter, sister, niece, or cousin. But every day this liberty gained ground, until at length the interest of the heir entirely vanished, and that of the lord began, in military tenures, to be little considered, and not at all in socage. However, in Magna Charta some check was given to that kind of alienation of the whole fief, that was carried on under the pretence of subinfeudation. *Nullus liber homo det de cætero amplius alicui vel vendat de terra sua quam ut de residuo terræ possit sufficienter fieri domino feudi servitium ei debitum;* and this sufficiency was by practice explained to the half of the fee†.

No provision being made in these laws for the consent of the lords, they generally, though not always, lost their fines; and a method likewise was invented to obviate their refusal, by levying fines in the king's courts of record in this manner. They used to suppose that the parties had covenanted to alienate; and

*Lib. 7. c. 1.

†Glanvil, ut supra. Ruffhead's statutes, vol. 1. p. 8.

all writs of covenant (being actions of public concern to the justice of the kingdom) were sueable only in the king's court; and by consequence this covenant to alienate was sueable only there. The superior court then being possessed of the matter, as an *adversary cause*, permitted the parties (on a fine being paid to the king, in lieu of that which he would have received at the end of the suit, from the party that failed) to make an amicable agreement or end of the suit, which was done by the party sued coming in, and recognizing, that is, acknowledging in court the right of the demandant to the land. This method of conveyance by fine grew up, and still continues to be one of the common assurances of the realm. For being transacted in a court of record, it obviated the danger of future controversies between parties, or any dispute concerning the execution of a deed, or the giving of livery and seizin*.

At length the statute of *Quia emptores terrarum*, already mentioned, was made, as well to remedy the mischiefs the lords complained they suffered by sub-infeudation, namely, the loss of their fruits of tenure, as to settle the doubt, as to the right of the tenants to alienate. This statute entirely takes away the lord's consent; for it gives the tenant free power to sell, or alien the whole, or part of his tenancy, to whom he pleased. But then, in favor of the lord, it establishes, that if the tenant parts with his whole interest in the lands, namely, the fee simple, the *alienée* should not hold of the *alienor*, but immediately from the alienor's lord, by the same services, by which he the alienor, had holden. Thus were the lords, in one respect

*Britton, c. 18. Wright on tenures, p. 163. 164.

secured in their rights, by the stopping the course of subinfeudations, and the tenants got a free liberty of alienation without the consent of the lord, or paying any fine to him. The king, however, not being named expressly in this act, it was construed not to bind him, as I have said before; and his consent was still required to the alienation of his tenants by military service, according to the rule of Magna Charta; that is, if more than half was alienated, so that the residue was deemed insufficient to answer the services. And this was put out of doubt by the statute *De prerogativa regis*, made the 17th of Edward the Second, cap. 6.

The bent towards free alienation, however, was so strong as to occasion a further mitigation so soon after, as the first year of Edward the Third. For then it was provided, that if the king's military tenant alienated without license, contrary to the late act, the land so alienated should not be absolutely forfeited as before, but that the king should be contented with a reasonable fine in chancery. These compositions were sometimes dispensed with, to encourage the tenants to attendance in hazardous expeditions; but, except in those singular cases, they continued to be paid, until the reign of Charles the Second, when knight's service being abolished, they fell of course along with it†.

Such was the progress the alienation of land made by conveyance *inter vivos*; but the bequeathing lands by last will did not keep equal pace with it. The first step made thereto was by laying hold of the doctrine of *uses*, which about the time of Richard

† Staunford, de prerog. Reg. cap. 7.

the Second was invented by the clergy, to elude the statutes of Mortmain, by which their advance from time to time was checked. As in every feudal grant there were two estates, the absolute propriety in the lord, a qualified property, namely, the possession and profits, in the tenant; now that they were prohibited from taking the real tenancy, they cunningly devised a means of subdividing the tenancy, by separating the profits from the possession. When, therefore, a man had a mind to alienate to the church, as he could not do it directly, he infeoffed a person to the use of such a monastery. Here the feoffee and his heirs were, in the construction of the common law, the proprietors, but, in fact, were bare trustees for the monastery, for the use of which they received the profits. But it may be asked, if the trustee or his heirs would not suffer them so to do, where was their remedy? The courts of common law allowed of no such division of estates at that time, nor would they have suffered such necessary laws to be defeated by such collusion, though they had been acquainted with these divided interests. They had recourse, therefore, to chancery, where, it being always, to the time of Henry the Eighth, filled with a churchman, they were sure to meet favor; and this court claiming an equitable power to enforce persons conscientiously to fulfil their engagements, compelled the trustee to support and maintain the uses.

These uses, once introduced, were applied to other purposes, particularly to that I am now upon, the enabling persons to dispose of their lands by will. The manner was thus: A. aliens his lands to B. to the use of A. himself for his life, and, after his death, to

such uses as he A. should, by his last will and testament, appoint. B. was then compellable in chancery, not only to suffer A. to take the profits during life, but after his death to execute the directions of the will, and to stand subject to the use of such persons as he appointed, and make such estates as he directed. This method gained ground every day, as many persons chose to retain their power of alienation in their own hands, to the last moment of their lives, and to keep their heirs, or other expectants, in continual dependance. And it at length grew so common, that in Henry the Eighth's time, it was thought proper to give leave, without going through this round-about method, to dispose of lands directly and immediately by will; of the whole of their socage lands, and of two thirds of the lands holden by knight's service. And this latter tenure being, after the Restoration, turned into common socage, all lands, not particularly restrained by settlement, are since become divisible; whereas, before these laws, they were only so in particular places, by local custom. But the statute that gives this power, in order to prevent frauds, expressly orders such will to be in writing; whence arose a distinction, as to the validity of wills of land, according as these lands had, or had not, been before divisible by custom. For those that were so before, continued divisible by will *nuncupative*, or without writing†.

But the reduction of the will into writing was not found sufficient to prevent forgery and perjury, and therefore the statute of frauds and perjuries has ad-

† An. 27. Hen. VIII. cap. 10. ap. Ruffhead, vol. 2. p. 226.

ded other solemnities, as requisite to pass lands by will. It requires that it shall be signed by the testator, or some other by his direction, and attested by three witnesses in his presence.

As to signing, it is insignificant where the signature is, whether at the bottom, or the top, or in the context of the will, the name of the testator, written by his own hand, in any place, being sufficient. And the putting his seal to the will, though without his writing, has been judged sufficient; for his seal is as much his mark, or sign, as his handwriting. As to the attestation, the statute requires it to be in the testator's presence; but it is absolutely necessary, that he should look on and see it done. Therefore, if it is attested in the room where he lies sick in bed, with his curtains undrawn, this is a good attestation; or if it is attested in a neighboring room, and the door open, so that he might possibly see it done, this is in his presence. But if the door be shut, or the place so situated that he could not by any means see the attestation, the will is void.

I shall next proceed to *involuntary alienation* of lands, namely, for payment of debts; and then give an account of the origin and progress of *estates tail*, which were introduced to restrain this power of alienation, and to restore, in some degree, the old law of keeping estates in the blood of the first purchaser.

LECTURE XVI.

Involuntary alienations of feudal land....Talliage....Edward I. introduces the first involuntary attachment of lands.... Statutes enacted for this purpose....Their effects....The origin of estates Tail.

THE *involuntary* alienation of feudal land, namely, the attaching, and afterwards the selling it for debt, kept pace pretty much, but not strictly, with the voluntary alienation already treated of. It first began in cities and trading boroughs, which were either the remains of old Roman towns, and where, consequently, the estates were allodial; or else new towns, founded either by the kings, or other great lords; or their demesnes, for the benefit of trades and arts within their own districts. External commerce, during those confused times, was little known or practised, the barbarians of the North infesting the coasts of the ocean, and the Saracens and Moors, those of the Mediterranean. It was the interest, therefore, of every lord who had such a town on his territory, to give it such privileges as would make it flourish, and outrival the towns of like nature on the lands of the king, or the neighboring lords. For the natives of such towns were no part of the feudal society, but were in the nature of socage tenants in the early times, removable, and consequently subject to be taxed, or, as our law calls it, *talliagable*, from the French word *tailler* to cut†.

† Madox, hist. of Exchequer, ch. 17. Firma burgi.

Talliage, consequently, was the cutting out a part from the whole of the tenant's substance, at the will of the lord. Yet this very power of talliage, which the lords were not for a long time inclined to part with, joined to their desire to make their towns flourish (that they might be able to bear a greater talliage) put them under a necessity of making such provisions, and granting such privileges, as were necessary for the use of trade and commerce, and at length, in effect, destroyed that absolute power of taxation, which the king and lords had all along claimed and exercised, and which at first, for their own interest's sake (which no doubt they well understood) they had used with great moderation. But after the discovery of the civil law at Amalfi in Italy, in the reign of our Stephen, the kings of Europe, who found therein an unlimited power of taxation in the emperor, were desirous to establish the like authority in themselves; and for that purpose began with oppressing their nobles with arbitrary scutages, or commutations for military services; and the towns of their demesne with talliages, not only arbitrary, but extravagantly beyond their power to pay without ruin†.

John of England was particularly famous for these extraordinary charges; for though his title to the crown was, at that time, by many of his subjects, and by others abroad, much doubted (as in prejudice of his elder brother's son Arthur then a minor) and his only just claim could be but by parliamentary authority, the omnipotence of which was not then so universally admitted, never was there a prince who carried

† Du Cange, et Spelman, voc. Tallagium. Madox, antiq. of the Exchequer, ch. 17.

his prerogative to such extravagant and oppressive heights. This, at length, occasioned the making *Magna Charta*; partly to assert and restore the ancient liberties of the nation, which had been invaded; partly to alter the old law, in such particulars as had been the engines of oppression. One of the chief of these latter remedies was the taking away the right of talliage, unless consented to in parliament. And now were the boroughs emancipated, and the burgesses made freemen, which before they could hardly be called, while their effects lay wholly at the mercy of the lord†.

In the next reign they advanced in importance; for as the treasure of the kingdom was in their hands, they were sure to be favored and courted on both sides, during the fierce contests between the king and the barons. And in the latter end of this reign it appears they had got admission into parliament, which not a little increased their consequence. Edward the First was a great favorer of merchants, and, for the security of their debts, introduced the first involuntary attachment of lands by the act called *statute merchant*, in the thirteenth year of his reign‡.

Before this time, no lands, except in boroughs by custom, were attachable for debt, but only in the case of the king, who, by right of his prerogative, could enter on the lands of his debtor, and receive the profits, until he was paid. For the same political reason, the surety also for a debt to the king, if he paid the debt, was allowed to come in the king's place, and en-

† Hume's hist. of England, appendix 2. Madox, Firma burgi, ch. 1.

‡ Ruffhead, vol. 1. p. 115.

joy the same privilege ; but in all other cases, the chattels were the only mark for the debt. This statute, after reciting that merchants had fallen into poverty, for want of a speedy remedy for recovering their dues, provides, that, in every city or great town, which the king should appoint, there should be kept a *recognizance*, that is, the acknowledgement or confession of debts due to merchants, and of the day of payment ; and that, in case payment was not made at the day, they may, or should, on the application of the merchant, and inspection of the roll, imprison the body of the debtor until payment ; and if no payment was made within three months, (which time the debtor was allowed to sell his chattels or lands) his chattels and lands were to be delivered to the merchant creditor, at a reasonable valuation, or *extent*, as it is called ; that out of the profits he might satisfy himself. And in case the debtor could not be found within the jurisdiction of the city or town, or had no chattels or lands therein, then was the mayor to send into chancery the recognizance of the debt, and the chancellor was to issue a writ to the sheriff in whose bailiwick the debtor was or had effects, to act in like manner. And so greatly was the merchant favored, that though this was but an estate for years (it being certain, from the valuation, in what time the debt would be paid) yet had he, with regard of maintaining actions to recover his possession when deprived of it, the privileges of a freeholder given him, by express provision in the act. Such was the favor shown to merchants to recover their just demands, nor were other creditors at this time left totally unprovided for, in cases where there was a deficiency of chattels.

In the same year a law was made for attaching the lands of persons, in favor of creditors who were not merchants, but in a different manner, called an *elegit*. I shall here use the words of the statute, as they are sufficiently plain, and easy to be understood. "When debt is recovered or acknowledged in the king's courts, or damages awarded, it shall be, from henceforth, in the election of him that sueth for such debt or damages, to have a writ to the sheriff of *fieri faciat* of the lands and goods" (which was the old remedy against the chattels) "or that the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of his plow, and the one half of his land, until the debt be levied upon a reasonable price or extent." After this the act gives the same privilege as in case of statute merchant, to the creditor dispossessed. From his making his election for the extending the lands, the writ directed to the sheriff for that purpose got the name of *elegit*. The difference of execution just mentioned shows clearly in how superior a light the legislature regarded the interests of commerce. That the debts to merchants, in whose prosperity the whole community was concerned, might be levied as soon as possible, the security by statute merchant gave possession of the whole of the land to the creditor; but the writ of *elegit* gave him possession of no more than one half. Originally men could not alien lands at all. Afterwards they were allowed to alien, but not beyond the half of the fief; and this principle or maxim was strongly regarded at the time the writ of *elegit* was framed, which was before the statute of *Quia emptores terrarum*, which allowed alienation of the whole. So that

whatever stretches might be found necessary, from the circumstances of merchandise, yet, with regard to the kingdom in general, a small deviation only was made from the common law, and the *elegit* was allowed to affect no more by operation of law than a man was supposed capable of alienating by his own deed†.

Two reigns after, namely, the 27th of Edward the Third, when the mart, or market of the standing commodities of England, namely, wool, woolfels, hides, lead and tin, was removed from Flanders into England, and a court merchant was erected in all such places where the staple was fixed, to be held by the mayor of the staple, he had power given him to take recognizances on the debts contracted at the staple, called *statute staple*, in the same manner as of *statute merchant*; and as the effect thereof was the same as of statute merchant, it need not be particularly repeated. However in some time afterwards, statute merchant was, by custom, extended to others beside merchants, and became one of the common assurances of the realm. The statute staple was likewise extended upon surmise of the debt being contracted at the staple; and though an act of Henry the Eighth in England restrained this latter to its ancient bounds, yet, the same act framed a new kind of security in imitation of it, common to all the subjects, called a recognizance on that act, which had all the effects and advantages of it‡.

The statutes of Elizabeth and those since her

† An. 13. Ed. I. c. 18. apud Ruffhead, append.

‡ An. 23. Henry VIII. cap. 6. ap. Ruffhead, vol. 2. p. 167.

time, concerning bankrupts, have gone much further. They not only, in the cases they extend to, laid the whole land open to the creditor, but, instead of a possession, and gradual discharge of the debt, which was all that was given by the statute merchant, *elegit*, or statute staple, they gave him a more speedy satisfaction, by enabling him to procure a sale of the lands†. But these later acts having never been enacted in this kingdom, I shall content myself with having barely hinted at them, and their effects.

Voluntary alienations of land having gained ground, and become at length established in England, contrary to the principles of the original law; and it being allowed for a maxim, that he that had a fee simple, had an absolute dominion over half of his land, to dispose of as he pleased, and, in some cases, of the whole; it could not be, but that there would arise many persons fond of perpetuating their estates in their families, and consequently displeased at this power of alienation. The means they used to attain their ends was under that maxim of law, *Tenor investituræ est inspiciendus*, or, as we express it, *Conventio vincit & dat modum donationi*. Every man therefore, absolute master of his estate, having a right to give it on what terms he pleased, they began, not as before, to give lands to a man and his heirs in general, for that would have given an absolute dominion, but to heirs limited, as to the *heirs of his body*, or to the *heirs male* of his body, or to the heirs of his body by such a woman. Here it was plain enough, that none were intended to take, but such as came within this

† An. 13. Eliz. c. 7. An. 1. James I. cap. 15. 21. James I. cap. 19. 5. George II. c. 30.

description; and by this means they hoped to defeat the power of alienation, to secure the estate to the persons described, and, in failure of them, the returning or reversion of it to themselves or their heirs.

But the judges complying with the universal bent of the times to the contrary, did not give these grants that construction they expected, upon the natural presumption, that every person will have heirs of his body, and that his posterity will continue forever. They construed this to be a fee simple; and yet, not entirely to disregard the intention of the donor, to be a fee simple conditional; as if the words had been *to a man and his heirs*, provided he have heirs of his body, and consequently to be alienable, and forfeitable upon a certain event. And one great reason of making this construction, I take to be the consideration of forfeiture for treason and felony, which, by such grants, would be defeated by another construction, and men thereby rendered more fearless to commit crimes in those troublesome times†.

Let us see then what estate or power was in *donor* and *donée* immediately by the grant; and what, upon the performance of the condition, namely, the having issue. And first, the *donée* had immediately a fee simple upon the grant, contrary to Britton's opinion, that, before children born, he had only an estate for life, and afterwards a fee. This appears from hence, that if a man had aliened in fee before issue had, the donor could not have entered upon the lands for the forfeiture, which, if he was tenant for life, he might. For the alienation in fee of tenant for life is an absolute forfeiture, and gives right of entry to the *lessor*.

† Coke on Littleton, b. 1. chap. 2. § 13.

The *donée*, then, having presently a fee simple in him, that is, an estate forever, than which there can be no greater; it was impossible the donor should have any actual estate or interest in the lands. He had not, therefore, a *reversion* vested in him, that is, a certain positive right of the lands returning to him or his heirs, as he would have had, if an estate for life only had been granted. He had only a bare *possibility of reverter*, in case the donée died without issue; or, leaving any, that issue had failed.

For the same reason, of the donée's having a fee simple, no *remainder* could be limited in such an estate. If land be given to A. for life or for years, and after the efflux of the life or years to B, B. hath presently a remainder in the lands for life, years, or in fee, according as the limitation of the estate is; because it is certain that a life, or term of years, must expire. But if land be given to A. and the heirs of his body, and, in failure of such heirs, to B. and his heirs, this remainder to B. before the statute *De Donis*, was void, for A. had immediately an estate forever, and therefore the limitation over to B. was rejected, as repugnant to the estate it depended upon.

But though, by such a grant, the donée got a fee, it being clogged with a condition, he had not, to all intents and purposes, an absolute power over it, either with respect to the donor, or his own issue. If the donor aliened before issue had, this was no bar to the donor, of his possibility of *reverter*; but it was a bar to the issue born afterwards, to enjoy the estate tail. For at this time fathers had a greater liberty to bar their children, than a stranger. Therefore, in this case, the *alienée* and his heirs, were to enjoy the

lands while the donée, or any issue of his body remained. But whenever they failed, the donor's, or his heir's possibility of reverter, was changed into an actual reversion, and the land became his. For now, by a subsequent event, it appeared, that the legal presumption of the estates continuing forever was ill founded. Neither, by the having of issue, was the condition performed to all purposes, so as to vest an absolute fee in the donor; for if the donée had died without issue, or if his issue failed, without any alienation being made by either, in this case also, the donor's possibility was changed into an actual reversion. But by having issue, the condition was so far performed, as to enlarge the power of the donée to three special purposes; first, to alien absolutely, and thereby to destroy the right of issue, and the possibility also of reverter in the donor; secondly, to charge and incumber it to the prejudice of both issue and donor; and thirdly, to forfeit it for treason or felony, to the prejudice of both also. Such was the construction the judges made of these grants, which, we see, gave, in almost all cases, an unlimited power of alienating, contrary to the intention of the donor, and the form of the gift†.

But, in the thirteenth of Edward the First, the lords, willing to preserve the grandeur of their families, obtained of that monarch the famous statute of Westminster the second, called *De Donis*, which by these words, *quod voluntas donatoris, secundum formam in charta Doni sui, manifeste expressam, de cætero observetur, ita quod non habeant illi, quibus tenementum sic fuit datum sub conditione, potestatem alienandi tene-*

† Wright on tenures, p. 186. et seq.

mentum sic datum, quo minus ad exitum illorum, quibus tenementum sic fuerit datum, remaneat post eorum obitum, vel ad donatorem vel ad ejus hæredem, si exitus deficiat, revertatur†, created a new kind of inheritance, *estates tail*, which very much resemble the old feudal donations, that were only descendible to the issue of the first feudatary. Let us see the consequence of these words. First, since the will of the donor was to be observed, it followed, that neither the donée, nor his issue, should have power to alien, incumber, or forfeit: the consequence of which was, that he could no longer have a fee simple, as these are inseparable incidents to such an estate; but a lesser estate, called *Fee tail*, from the French word *Tailler* beforementioned, as being, like other lesser estates, carved out of the fee simple.

Were it to be asked, in whom did the fee simple reside? it is plain it could be in none other but the donor, who had it originally in him. Therefore, by this statute, the possibility of reverter, which the donor had, was changed into an actual present interest, called a *reversion in fee simple*. But it was not always necessary that the fee simple should be in the donor; for estates tail, being now less than a fee simple, it became possible to limit a remainder thereon which should be good: Thus, if a gift be made to A. and the heirs of his body, and, in failure of such heirs, to B. and his heirs; in this case, there is no reversion: for the donor hath parted with his whole estate, but A. hath an estate tail, and B. a remainder in fee simple. Many remainders may be limited on one anoth-

† Coke's institutes, part 2. p. 332. Ruffhead, vol. 1. p. 79.

er, as for instance, an estate may be given to A. for years, remainder to B. for life, remainder to C. in tail, remainder to D. in tail, remainder to E. in fee simple; but if the last remainder is not in fee simple, but in fee tail, then is the reversion in fee simple to the donor.

However, although a tenant in tail after this statute could alien only for his own life, his heir in tail was not allowed to enter upon the alienée without first proving his right in a court of law, and this is what is meant by saying, *though a tenant in tail could not destroy the estate tail by his alienation, yet he could continue it.* The reason of this is, that all estates of inheritance are presumed fee simple, until the contrary is proved, and it would be unjust to remove a possessor, who came in by a title apparently fair, until the weakness of that title appears judicially. This rule, however, extended only to estates corporeal, that lay in liveries, not to incorporeal ones, that lay in grant; which shows that this maxim of its working a discontinuance proceeds from the feudal principle, of protecting the possessor, because he was to do the feudal duties.

The statute to guard these inheritances from alienations, expressly provides, that even a fine levied of them in the king's courts of record should be *ipso jure* null.

The method of recovering such lands so discontinued, is by a writ called a *Formedon*, from the words *forma doni*, of which writ there are three kinds, according to the title of the persons who bring them; *formedon, in the reverter, in the descender*, and *in the remainder*. *Formedon in the reverter* lies for the do-

nor or his heirs, and lay at the common law after the failure of issue, where the alienation was before issue had; but since the statute, upon the failure of issue, it lies, though the alienation be after. *Formedon in descender* lies for the issue in tail, when the ancestor has aliened, and is given by the statute. The form of it is as follows: "The king to the sheriff "of —— greeting, command A. that he justly, and "without delay, restore to B. such a manor, &c. which "C. gave to D. and the heirs of his body, and which, "after the death of the said D. ought to descend to "the said B. the son of the said D. by the form of the "aforesaid gift, as he says." *Formedon in remainder* lies for a remainder man in tail, or his issue, after the particular estate previous to his (whether it be for years, life, or in tail) is spent. In the reverter, instead of the word *descend*, it is *revert;* and in the re-remainder, *remain**.

Having shewn the origin of estates tail, I shall next consider their consequences, and future fortune.

*Coke's institutes, part 2. p. 336.

LECTURE XVII.

The consequences and history of estates tail.

THE following are the words of my lord Coke. "When all estates were fee simple, then were pur-"chasers sure of their purchases, farmers of their "leases, creditors of their debts; the king and lords "had their escheats, forfeitures, wardships, and other "profits of their seigniories: and for these, and other "like cases, by the wisdom of the common law, all "estates of inheritance were fee simple; and what "contentions and mischiefs have crept into the quiet "of the law by these fettered inheritances, daily ex-"perience teacheth us." By this enumeration of his of the advantages that attended estates of fee simple, it is easy to see who where the sufferers, and wherein they suffered, by the introduction of estates tail. But it is a little surprising that he should make such a slip as to say, that before this creditors were secure of their debts by all estates being fee simple; when the first statute that gave them any hold of lands was made after this statute *De Donis*, in the latter end of the same year of the king's reign, the thirteenth of Edward the First. Those, indeed, who had landed estates at that time, and their posterity, were great gainers hereby; but the king, and the nation in general were sufferers. The nation suffered by the check that commerce, then just arising, re-

ceived, by so much lands becoming unalienable, and the crown suffered in a double respect; first, by the opportunity it afforded to strengthen and explain the great estates of the lords, and secondly by the security it gave when enlarged.

Soon after the conquest, the estates of the English lords were enormous. William brought over an army of 60,000 men, not levied by himself, (for he was unable to raise or defray the expences of a third of that number out of the province of Normandy) but consisting chiefly of adventurers, who engaged in the expedition on the promise of forfeited lands, in proportion to the numbers they brought with them. Accordingly, some had seven hundred manors, others five, four, three, two, one hundred, or less; insomuch, that all the lands of England (if we except the king's demesnes, the church lands, and the little properties annexed to cities and boroughs) were in no more than about seven hundred hands, the principal of which were petty princes, like the dukes and counts of France*.

William was sensible, from the experience of that country, how dangerous such large grants would prove to the authority of the crown, and he accordingly moderated them as well as his circumstances would permit. That the king might not be too far removed from the view of the lower people by the interposition of the great lords, their immediate superiors, he did not, as in France, leave the whole judicial power, and the profits of the county courts in the earls; but justice was administered in the king's name by his sher-

*Hume's hist. of England, vol. i. Carte's hist. 382, 383, 384, 420. Brady's hist. append.

iffs; who, as being deputies of the earls, were called *Vice Comites*, and who accounted for the profits to the king, except as for the one third, which in England was the earl's proportion; and in after times, upon new creations, the third also was referred to the king, and only a certain stipend out of it, generally twenty pounds a year, assigned to the earl*.

Another means he used of disarming them of the too great powers immoderate estates would have given them, was avoiding the rock the French court had split on, the giving vast territories, lying contiguous to each other, in fief, whereby all the followers were immediately in the view and at the call of the lords. William acted more prudently. He generally gave to an earl twenty knights fees, which was the proportion of an English earldom in the county whose title he bore; perhaps thirteen, or a barony, in another county; and the remainder, he was to give, either in baronies in distant counties, or more generally in single knight's fees, dispersed through all England. This was his general method, except to a few of his near relations, to whom he gave palatinates with *jura regalia*, which were exactly in the nature of the French dutchies and counties†.

Another prudent step he took for the benefit of his successors, was the making all his grants *feminine fiefs*. For as, in a course of several descents, it must happen that lineal males would frequently fail, by admitting the daughters in that case, these vast inheritances were frequently broken, as females succeeded equally. His successors followed his plan, and for that purpose, not only permitted, but encouraged their

*Selden, tit. hon. part 2. chap. 5. § 3. †Ibid. § 8 and 9.

great vassals to alien and dismember their properties; and whenever a great escheat fell, were always sure, unless there was a prince of the blood to be provided for, to divide it into many hands.

Both kings and people received the advantages, and would have received more, if this policy had continued. The immediate tenants of the crown being increased in number, and lessened in wealth, were not able to confederate so easily against the crown; and sensible of their being weakened, had occasion for the support of the lower rank of the people, whom, consequently, they treated with more gentleness and equality than before. But this statute of entails put a stop to the progress that course of things were in; estates became unalienable, and indivisible. The property of no lord could lessen; and if it happened as it frequently did, that they acquired, either by descent or marriage, or the purchase of an estate not tied up, a new entail connected it inseparately with the old one; and thus the lords, towards the end of the Plantagenet line, grew up to such a pitch of power, as was dangerous to the constitution, and when they were divided into the factions of the York and Lancaster, deluged the land with blood.

The king saw the mischief betimes, but the mischief was done. The act was passed, and to get it repealed was impossible. They had nothing left, but to find means to elude it by construction of law, wherever they could. The scheme was readily embraced by the judges and lawyers, who had raised great outcries against these fettered inheritances, and were joined by all the trading and industrious people, and even by the younger branches of these great

families, whose fathers were thereby disabled to provide for them.

The first means found out was by *collateral warranty*. Before this statute all warranties by an ancestor bound the heir at law, although no land descended from that ancestor, upon the presumption that no man would disinherit his heir, without leaving him a recompence. But this could be no longer the law in general; for, if so, the ancestor in tail might, by his warranty, defeat the tail, contrary to the statute, which says, *The will of the donor shall be observed.* They therefore made now a distinction between a *lineal* warranty and a *collateral* one. Lineal warranty is that which is made by tenants in tail; collateral, that which is made by one who is a stranger to the entail. In the first case they held it no bar unless assets descended; that is, an estate in fee simple, equal in value. But in the latter case, that no assets descended, they held it at bar as at common law*.

To illustrate this by an example, If lands are given to A. and the heirs male of his body, and A. aliens with warranty, this is lineal warranty, and shall not bind the son; but if B. the brother of A. who has nothing to say to the entail, joins in the alienation with warranty, or releases to the alienee with warranty, or disseizes A. and then aliens with warranty, and dies without issue, so that A's son is his heir, this warranty is collateral to the entail, and without assets, should bind the son of A. as at common law. At first view it may seem surprising how this construction gained ground against the express words of

*Coke on Littleton, lib. 3. chap. 13. § 703, 709.

the statute, *Voluntas donatoris de cætero observetur*; for the will of the donor was certainly as much defeated by a collateral, as by a lineal warranty; but the judges took advantage of the preamble of the act, which, reciting the mischief, speaks only of the alienation of the tenant in tail, that is, of lineal warranty.... They restrained therefore, out of disfavor to these fettered estates, the general words in the enacting part, to the particular case mentioned in the preamble, on this ground, that the common law was not to be altered without it appeared undeniable that the legislator intended it; and here, as to collateral alienation, they are silent. This was the first device used to defeat estates tail, namely, by getting a collateral relation, whose heir the issue tail was to be, to concur in the alienation, and to bind himself and heirs to warranty; which was generally obtained for a small consideration, as such person could never be a gainer by the estate tail, since it could in no case come to him.

When once this rule of collateral warranty barring an estate tail, was settled, attempts were made to prevent its taking effect, and to continue such estate notwithstanding. Jude Richel, in Richard the Second's time, led the way; he having settled lands on his eldest son in tail; remainder to his second son in tail; adds, that the lands are given on this condition, that if the eldest son should alien, that instant his estate should cease and determine, and the land remain to the second son and the heirs of his body. Here he imagined he had got clear of collateral warranty, because the first estate was to determine, and the second to commence immediately on the alienation, and

before any collateral warranty could descend on the second. But the judges determined this condition to be void; for which Littleton gives three reasons, drawn rather from the art of law, than from the principles of plain reason*. The true ground seems to be this:

In every reign, from Edward the First down to Edward the Fourth, bills were brought into parliament to repeal the statute *De Donis*, as Coke informs us, but had constantly miscarried, as the estates of the majority in parliament were entailed. The only relief found out at that time against their mischiefs was this collateral warranty; and if Richel's conditions were to be adjudged good, all estates tail would have been made with such conditions, and there would have been an end of that method of defeating them. The same was the fate of a similar settlement of Judge Thirning, who took the advice of his cotemporary judges, in wording his condition so as to make it effectual; but their successors were of a different opinion, and rejected it. However, these collateral warranties not being to be got in all cases, the relief was but partial, and extended only to particular cases.... And the tenant in tail himself could by no act of his, in concurrence with any other person, except a collateral ancestor of the issue in tail, bar them.

At length the judges found out a device, by a fiction in law, to enable him to bar his issue, and all remainders and reversions. A. brings his action real against B. tenant in tail, and alledges the lands in tail to be his A's right and inheritance, when in truth he hath no title thereto; B. comes in, and voucheth C.

*Lib. 3. chap. 13. § 720.

to warranty, who enters into warranty, and after, when he should defend, makes default, so judgment is given for A. against B. and for B. to recover in value against C. Here, though C. has no land to render in value, the judges have construed B, and all that should come after him, to be barred; because if C. ever after purchased lands, these lands might be recovered from him, by virtue of the former judgment; and so there was a possibility of a recompence. Though this decision at first created great outcries, and even in Henry the Eighth's reign was but weakly defended in equity and conscience, by the author of *Doctor and Student*, yet the judges, for the public good, constantly adhering to it, and these common recoveries being taken notice of and approved of by subsequent acts of parliament, are at length grown to be common assurances of lands, and, passing in the court of record, are the best securities of estates*.

The barring of estates tail, *by fine* passed in the king's courts, grew up another way, and is founded on an act of parliament in Henry the Seventh's reign, and is indeed, properly speaking, a partial repeal of the statute *De Donis*, since it puts it in the tenant in tail's power to destroy it, by observing certain solemnities. Though common recoveries had been invented some years before, yet as they had not had time to grow up to such a degree of firmness as to be sufficiently depended upon, their legality was still doubted, and it was not certain that future judges would give them the same construction which their predecessors had done. Therefore, that politic prince

*Saintgerman, cap. 50

Henry the Seventh, who saw, in all its lights, that superiority which the preservation of landed property in their families gave to the nobles, a superiority which had cost some of his predecessors their lives and crowns, freed lawyers from the trouble of inventing future devices against entails, by getting the famous act passed in the fourth year of his reign, which made a fine, with proclamations to conclude all persons, strangers as well as privies*.

It was the purport of, and so it is expressed in the statute *De Donis*, that a fine levied of entailed lands should be *ipso jure* null, and it is the intent of this act, on the contrary, that a fine, levied with the prescribed solemnity, should be valid to bar the persons therein intended to be barred. There is a clause indeed, in this act, saving the right and interests of all persons, which accrued after the ingrossing of the fine, they pursuing their rights within a certain time after they accrued. This clause was apparently thrown in to make the act pass, and to deceive the enactors into an opinion, that it would not affect estates tail; and on this clause a doubt occurred in that reign, whether the issue of tenant in tail could be barred by this statute, and that, notwithstanding by the tenor of it, privies were barred. The question was, whether the statute meant privies to the fine, or privies to the estate of the person levying it? The issue were not privies in the first sense, but were in the latter. The judges embraced the opportunity this ambiguity gave them of defeating entails, and bound the issue by the fine. A statute of the succeeding prince approved of that

*Bacon, voc. Fine and Recovery. An. 4. Hen VII. c. 24 ap. Ruffhead, vol. 2. p. 79.

construction, gave it retrospect, and prevented all ambiguity for the future*.

Thus were estates tail no longer certain perpetuities, but defeasible upon performing certain requisite solemnities. Still however they continued not to be forfeitable for crimes, which was a point not to be got over without an act of parliament, and there was little likelihood of obtaining such an one; but Henry the Eighth snatched the lucky opportunity his situation gave him, of gaining this important point, in the 26th year of his reign, when he had quarrelled with the Pope, and all hope of accommodation vanished; when a sentence of excommunication was denounced against him, and numbers of his subjects, many of them of great fortunes, bigotedly attached to the old religion, were known to meditate rebellion. The parliament, the majority of which were of the new profession, seeing no other means to preserve the security of the state, and the protestant religion, yielded at length to the passing of an act for that purpose†.

However, there were not wanting persons after this, willing to create perpetuities, in which they were always disappointed by the decision of the judges.... The first device was by giving estates upon condition, that if tenants in tail should levy a fine, or suffer a recovery, the estate should cease, and go over to the next issue entitled. But the judges rejected such condition, for the same reason as in Richel's case.... They adjudged the right of barring by a fine or recovery to be an incident inseparable to a fee tail, and all conditions repugnant thereto idle and void; for

*An. 32. Hen. VIII. c. 36. ap. Ruffhead, vol. 2. p. 296.

†Ruffhead, vol. 2. p. 216.

how could the law suffer that an estate, by previous act of the donor, should, upon a judgment at law, become vested in any other person than him who recovered? These ingenious conveyancers, finding that the limitation upon breach of the condition came too late, as the estate had already gone in another channel, framed the condition thus; that *if tenant in tail should go about to levy &c. or make any covenant to levy, or hold any communication about levying, &c. the estate should then, &c.* But these were all condemned upon the old principle, and still more for their vagueness and uncertainty.

LECTURE XVIII.

The constitution of a feudal monarchy....The dignity and revenues of the King.....An examination of his power as to the raising of taxes and subsidies.

AS in my former lectures, I drew a general sketch of the nature and form of the governments that prevailed among the northern nations whilst they remained in Germany, and what alterations ensued on their being removed within the limits of the Roman empire, it will be now proper to shew, in as brief a manner as may consist with clearness, the nature and constitution of a feudal monarchy, when estates were become hereditary, the several constituent parts thereof, and what were the chief of the peculiar rights and privileges of each part. This research will be of use, not only to understand our present constitution, which is derived from thence, but to make us admire and esteem it, when we compare it with that which was its original, and observe the many improvements it has undergone. From hence, likewise, may be determined that famous question, whether our kings were originally absolute, and all our privileges only concessions of theirs; or whether the chief of them are not originally inherent rights, and coeval with the monarchy; not, indeed in all the subjects, for that, in old times, was not the case, but in all that were *freemen*, and, as all are such now, do consequently belong to all.

To begin with the king, the head of the political body. His dignity and power were great, but not absolute and unlimited. Indeed, it was impossible, in the nature of things, even if it had been declared so by law, that it could have continued in that state, when he had no standing force, and the sword was in the hand of the people. And yet it must be owned his dignity was so high, as to give a superficial observer some room, if he is partially inclined, to lean to that opinion. All the lands in his dominions were holden of him. For, by degrees, the *allodia* had been changed into, and supposed to have been derived from, his original grant, and consequently, revertible to him. But then, the land proprietors had (on fulfilling the conditions they were bound to) a secure and permanent interest in their possessions. He could neither take them away at pleasure, nor lay taxes or talliages on them by arbitrary will, which would have been little different. Since in Magna Charta, we find the people insisting that the king had no right to assess the quantity of escuage, which was a pecuniary commutation for military service, nor to lay talliages on his other subjects, but that both must be done in parliament. He was a necessary party to the making new laws, and to the changing and abrogating old ones; and from him they received their binding force, insomuch that many old laws, tho' passed in parliament, run in the king's name only. For in those days, persons were more attentive to substance than forms; and it was not then even suspected, in any nation of Europe, that any king would arrogate to himself a power so inconsistent with the original freedom of the German nations. Nay, in France, to

this day, the king's edicts are not laws, until registered in parliament, which implies the consent of the people, tho' that consent is too often extorted by the violent power that monarch has assumed over the persons and liberty of the members of that body*.

The dignity of the king was supported, in the eyes of the people, not only by the splendor of his royalty, but by the lowly reverence paid him by the greatest of his lords. At solemn feasts they waited on him on the knee, or did other menial offices about his person, as their tenures required, and did their homage and fealty with the same lowly and humiliating circumstances that the meanest of their vassals paid to them. His person likewise was sacred and guarded by the law, which inflicted the most horrible punishment for attempts against him; neither was he to be resisted, or accountable for any private injury done personally by himself, on any account whatsoever. For the state thought it better to suffer a few personal wrongs to individuals, than to endanger the safety of the whole, by rendering the head insecure.

But the greatest of the kingly power consisted in his being entirely entrusted with the executive part of the government, both at home and abroad. At home justice was administered in his name, and by officers of his appointment. He had, likewise, the disposal of all the great offices of the state, with an exception of such as had been granted by his predecessors in fee, and of all other offices and employments exercised in the kingdom immediately under

* Hottoman. Franco-Gall. Boulainvilliers on the ancient parliaments of France. Fortescue de laud. leg. Angl. cap. 34. 36.

him. Abroad he made war and peace, treaties, and truces as he pleased. He led his armies in person, or appointed commanders; and exercised, in time of war, that absolute power over his armies that is essential to their preservation and discipline. But how was he enabled to support the expence of the government, or to provide for the defence of the kingdom, or carry on foreign war; since, if he was not furnished in that respect, these high sounding prerogatives had been but empty names, and the state might have perished? And if he could at pleasure levy the necessary sums, he being sole judge of the necessity, both as to occasion and quantity, as Charles the First claimed in the case of ship money, the state of the subject was precarious, and the king would have been as absolute a monarch as the present king of France or Spain*.

But abundant provision was made on this head, and that without overburdening the subject, for supporting the ordinary expences of the government. A vast demesne was set apart to the king, amounting, in England to one thousand four hundred and twenty-two manors, as also many other lands, which had not been erected into manors. Besides these, he had the profits of all his feudal tenures, his wardships, marriages, and reliefs; the benefit of escheats, either upon failure of heirs or forfeiture; the goods of felons and traitors; the profits of his courts of justice; besides many other casualties, which amounted to an immense revenue; insomuch, that, we are informed, that William the Conqueror had L. 1061: 10s.

*Craig, de feud. lib. 1 dieges. 16. Du Cange voc. Dominicum.

a-day, that is, allowing for the comparative value of money, near four millions a-year; so that Fortesque might well say, that, originally, the king of England was the richest king in Europe. Such a sum was not only sufficient for the occasions of peace, but out of it he might spare considerably for the exigencies of war*.

This revenue, however great, was not sufficient to support a war of any importance and continuance, besides the extraordinary expence of government. It remains, therefore, to see what provision this constitution made, in addition to what the monarch might spare, for the defence of England, as it might be attacked either by land or sea. For the former, every seaport was, in proportion to its ability, obliged to find, in time of danger, at their own expence, one or more ships properly furnished with men and arms; which, joined to such other ships as the king hired, were, in general, an overmatch for the invaders. But if the enemy had got footing in the country, the defence at land was by the knights or military tenants who were obliged to serve on horseback in any part of England; and by the socage tenants, or infantry, who, in case of invasion, were likewise obliged to serve, but not out of their own country, unless they themselves pleased, and then they were paid by the king.

With respect to carrying on *offensive* war into the enemy's country, the king of England had great advantages over any other feudal monarch. In the other feudal kingdoms the military vassals were not

* Madox, hist. Exchеq. Carte's hist. of England, vol. 1. p. 423.

obliged to serve in any offensive war unless it was just, the determination of which point was in themselves; but William the Conqueror obliged all to whom he gave tenures to serve him *ubicunque*; and though he had not above three hundred, if so many, immediate military tenants under him, yet these were obliged, on all occasions, to furnish sixty thousand knights compleatly equipped, and ready to serve forty days at their own expence. If he wanted their service longer, he was obliged to obtain it on what terms he could. There is therefore, no reason to wonder that the king of England, though master of so comparatively small a territory, was, in general, an overmatch, in those early times, for the power of France. As for *infantry* in his foreign wars, he had none obliged to attend him. Those he had were socage tenants, whose services were certain; so that he was obliged to engage, and pay them, as hired soldiers. As the socage tenants in his dominions had a good share of property, and enjoyed it without oppression, it is no wonder the English archers in those days had a gallant spirit, and were as redoubtable as the English infantry is at present.

To support these military tenants, who served after the necessary time, and likewise his infantry (as the surplus of his ordinary revenue would not suffice) he had *customs* and *talliages*, and *aids* and *subsidies* granted by parliament. These customs, or so much paid by merchants on the exportation of goods, were of two kinds; as paid either by *merchant strangers*, or by *merchant denizens**.

*Carte, ibid. Hume, append. 2. Madox, antiq. of the Exchcq. passim.

The customs paid by merchant strangers were not originally settled by act of parliament, but by a compact between the merchant strangers and king Edward the First. In the Saxon times the king had a power of excluding strangers from his kingdom, not merely with an intention of inducing their own people to traffick, but chiefly to keep out the Danes, who were the masters of the sea; lest, under pretence of trade, they might get footing in, and become acquainted with the state of the kingdom. They were, accordingly, admitted by the kings upon such terms as the latter were pleased to impose; but Edward, who had the success and prosperity of his kingdom at heart, came to a perpetual composition with them; gave them several privileges, and they gave to him certain customs in return. What shews they had their origin from consent is, that the king could not raise them without applying to parliament. The customs of natives or denizens were, certainly, first given to the king by parliament; though this has been denied by some, merely because no such act is to be found, as if many of the ancient acts had not been lost; but there are acts and charters still extant which expressly say they were appointed and granted by parliament, without the power of which they could not be either altered or enlarged.

The difference between the customs and the other aids I have mentioned, *viz.* talliages and subsidies, is, that the latter were occasional, granted only on particular emergencies, whereas the *customs* were for ever. If it be asked how they came to be granted in that manner, we must refer back to the original state of boroughs and their inhabitants, traders, in the feu-

dal law. In France, the Roman towns were taken into protection, and had their ancient privileges allowed them; but in the series of wars that happened in that country for ages, every one of them in their turns were stormed, and reduced to vassalage, either to the king or some other great lord; and as, now, these lords had learned that the Roman emperor laid on taxes at his pleasure, it was but natural they should claim the same right, especially over towns they had taken in war. The burgesses, therefore, became in the nature of villains, not indeed of common villains, for that would absolutely have destroyed trade, but with respect to arbitrary taxation, which, however, if the lord was wise, was never exorbitant. In England, I apprehend, they became villains; for the Saxons were a murdering race, and extirpated the old inhabitants. However, wise kings, considering the advantages of commerce, by degrees, bestowed privileges on certain places, in order to render them flourishing and wealthy; and at length, about the time of Magna Charta, or before, when every uncertain service was varying to a certainty, this privilege was obtained for merchant adventurers. But the other burgesses, that did not import or export, and likewise villains, were still talliageable at will. This was restrained by Magna Charta, which declares all talliages unlawful, unless ordained by parliament†.

To come to the latter head, whether taxes, aids, and subsidies can be assessed by the king, as sole judge of the occasion, and the *quantum*....or whether they must be granted by parliament, was the great and principal contest between the two first princes of

†Firma Burgi, ch. 4. 5. 11.

the unfortunate house of Stuart and their people, and which, concurring with other causes, cost the last of them his life and throne. To say nothing of the divine hereditary right urged on the king's behalf, and which, if examined into strictly, no royal family in Europe had less pretensions to claim, both sides referred themselves to the ancient constitution for the decision of this point. The king's friends urged that all lands were holden from him by services, and that this was one of his prerogatives, and a necessary one to the defence of the state. They produced several instances of its having been done, and submitted to, not only in the times of the worst, but of some of the best kings; and as to acts of parliament against it, they were extorted from the monarchs in particular exigencies, and could not bind their successors, as their right was from God.

The advocates of the people, on the other hand, insisted, that in England, as in all other feudal countries, the right of the king was founded on compact; that William the conqueror was not master of all the lands in England, nor did he give them on these terms; that he claimed no right but what the Saxon kings had, and this they certainly had not; that he established and confirmed the Saxon laws, except such as were by parliament altered; that he gave away none but the forfeited lands, and gave them on the same terms as they were generally given in feudal countries, where such a power was in those days unknown. They admitted, that, in fact, the kings of England had sometimes exercised this power, and that, on some occasions the people submitted to it. But they insisted, that most of the kings that did it, were op-

pressors of the worst kind in all respects; that the subjects even in submitting, insisted on their ancient rights and freedom, and every one of these princes afterwards retracted, and confessed they had done amiss. If one or two of the best and wisest of their kings had practised this, they insisted that their ancestors' acquiescence once or twice, in the measures of a prince they had absolute confidence in, and at times when the danger, perhaps, was so imminent as to stare every man in the face (for it was scarce ever done by a good prince) as when there was a fleet already assembled in the ports of France to waft over an army, should not be considered as conveying a right to future kings indiscriminately, as a surrender of their important privileges of taxation. They insisted that these good and wise kings had acknowledged the rights of the people; that they excused what they had done, as extorted by urgent necessity, for the preservation of the whole; that by repeated acts of parliament, they had disavowed this power, and declared such proceedings should never be drawn into precedent. They observed that there was no occasion for the vast demesne of the king, if he had this extraordinary prerogative to exert whenever he pleased. They denied the king's divine right to the succession of the crown, and that absolute unlimited authority that was deduced from it. They insisted that he was a king by compact, that his succession depended on that compact, though they allowed that a king intitled by that compact, and acting according to it, has a divine right of government, as every legal and righteous magistrate hath. They inferred therefore, that he was a limited monarch, and

consequently that he and his successors were bound by the legislative, the supreme authority*.

The advocates of the king treated the original compact as a chimera, and desired them to produce it; which the other side thought an unreasonable demand, as it was, they alledged, transacted when both king and people were utterly illiterate. They thought the utmost proof possible was given by quoting the real acts of authority, which the Saxon kings had exercised: among which this was not to be found; that the Norman kings, though some of them had occasionally practised it, had, in general, both bad and good princes, afterwards disclaimed the right, and that it never had (though perhaps submitted to in one or two instances) been given up by their ancestors, who always, and even to the face of their best princes, insisted that it was an encroachment on those franchises they were entitled to by their birthright.

Such, in general, were the principles on which the arguments were maintained on both sides: for to go into *minutiæ*, would not consist with the design of this undertaking. I apprehend it will be evident from this detail of mine, though I protest I designed to represent both sides fairly, that I am inclined to the people in this question. I own I think that any one that considers impartially the few monuments that remain of the old Saxon times, either in their laws or histories, the constant course since the conquest, and the practice of nations abroad, who had the same feudal policy, must acknowledge, that though this right was claimed and exercised by John, Henry the Third, Edward the First, Second, and Third, Richard the

*Bibliotheca politica, Dial. 5. and 10.

Second, and Henry the Eighth, it was in the event disclaimed by every one of them, by the greatest of our kings, Edward the First and Third, and Henry the Eighth, with such candor and free will, as inforced confidence in them; by the others, in truth, because they could not help it. I hope I shall stand excused if I add, that the majority of those who engaged in the civil war, either for king Charles, or against him, were of the same opinion. For, had he not given up this point (and indeed he did it with all the appearances of the greatest sincerity) he would not have got three thousand men to appear for him in the field. But, unfortunately for his family and us (for we still feel the effects of it from the popish education his offspring got abroad) his concession came too late. He had lost the confidence of too many of his people, and a party of republicans were formed; all reasonable securities were certainly given; but upon pretence that he could not be depended upon, his enemies prevailed on too many to insist on such conditions, as would have left him but a king in name, and unhinged the whole frame of government. Thus the partizans of absolute monarchy on one side, and the republicans, with a parcel of crafty ambitious men, who for their own private views affected that character, on the other, rented the kingdom between them, and obliged the honest, and the friends to the old constitution, to take side either with one party or other, and they were accordingly, for their moderation and desire of peace, and a legal settlement, equally despised which ever side they joined with*.

I shall make but one observation more; that though

*Biblioth. polit. 320. 330. 333. 339. 356. 357. 370.

it is very false reasoning to argue from events when referred to the decision of God, as to the matter of right in question; I cannot help being struck with observing, that though this has been a question of five hundred years standing in England, the decision of providence hath constantly been in favor of the people. If it has been so in other countries for two hundred or two hundred and fifty years past, which is the utmost, let us investigate the causes of the difference, and act accordingly. The ancients tell us it is impossible that a brave and virtuous nation can ever be slaves, and, on the contrary, that no nation that is cowardly, or generally vicious, can be free. Let us bless God, who hath for so long a time favoured these realms. Let us act towards the family that reigns over us, as becomes free subjects, to the guardians of liberty, and of the natural rights to mankind; but above all, let us train posterity so as to be deserving of the continuance of these blessings, that Montesquieu's prophecy† may never appear to be justly founded.

"England (says he) in the course of things, *must* lose her liberties, and then she will be a greater slave than any of her neighbors."

†L'Esprit des loix, liv. 11. chap. 6.

LECTURE XIX.

The King's power as to the making, repealing, altering, or dispensing with laws.

HAVING, in the last lecture, begun to draw the outlines of a feudal monarchy, particularly, as it anciently was in England, in order that it may be more easy to understand the nature of our present constitution; and to see how far, and in what particulars, it has deviated from its original, either for the better or the worse; and having, for that purpose, begun with the regal prerogatives, and particularly with that important one, the raising of money, it will be proper to proceed to the king's power as to the *laws*, either in the making, repealing, altering, or dispensing with them: for these powers are now exercised by the sovereigns in almost all the monarchies that were anciently feudal, and have been claimed likewise in England. That this power could not originally have been in the king in any feudal state, is plain from the detail I have given of the old German governments, and of the gradual progress and formation of the European kingdoms from thence; and it would not only be an entertaining, but useful study for gentlemen of fortune, to trace, through the history of every nation, the several steps whereby the liberties of the people have been undermined, until the whole power hath settled in the monarch; but I shall content myself

with a few observations on this subject, drawn from the History of England, and such as, in my apprehension, will be sufficient to settle this point as to us.

If the monarchies on the continent were not absolute in this respect, much less could the Saxon kings pretend to such a power, from the very nature of the foundation of their kingdoms. The Franks, the Goths, the Burgundians, and others on the continent, were led to conquest by those who had been previously their kings, and who had a stable and settled authority over them. Very different was the settlement of the Saxons in Britain. Neither Hengist, nor any of their first kings, had been kings in Germany. They were mere leaders of companies of freebooters, who had associated themselves first for plunder, and afterwards to fix themselves in new seats, in imitation of the other German nations. Their leaders, therefore, could have no powers, but what were conferred upon them by their followers; and that *law-making* was not one of those powers, appears from the frequent meetings of their *witenagemots*, which was the name they gave to their general assemblies, or parliaments; and from all the laws of theirs now extant being made in them. It was the boast of the good and wise king Alfred, that "he left the people of England as free as "the internal thoughts of man," a speech which could never have proceeded from the mouth of one who had the least notion of the almighty power of the kings over the laws. His successors were of the same opinion. The law of Edward the Confessor, which was ratified by the Conqueror, says, *Debet rex omnia rite facere in regno, & per judicium procerum regni,*

and if *omnia*, surely the making and repealing of laws, the most important of all*.

Our historians and records from that time down undeniably shew who, in every age, were the legislators, and that the kings alone were not so. The same is expressly delivered by all the old writers on the law, Glanville, Bracton, Britton, Fleta and Fortescue. Nay, some of them, in their zeal for liberty, have gone so far, as to pervert the meaning of the civil law, which, in their time, was in high repute, and to deny the absolute power of legislation to the Roman emperor. The civil law says, *Quod principi placet legis habet vigorem;* but how doth Bracton comment upon it? *Id est non quicquid de voluntate regis temere præsumptum est, sed animo condendi jura, sed quod consilio magistratuum suorum, rege auctoritatem præstante, & habita super hoc deliberatione & tractatu, recte fuerit definitum*†.

It must, however, be owned that many of our princes were very desirous of assuming this power. In the reign of our Henry the First, a perfect copy of the civil law being discovered at Amalfi, the princes of Europe got an idea of a monarchy more powerful and absolute than either kings or people had for many centuries before any notion of; and they were, in general, desirous enough to stretch, if they could, their limited prerogative to the height of the ancient imperial despotism; but to do this by their own authority was impossible. A wiser way was pursued. The excellency of this law was, on every occasion,

*Asser, de Gestis Alfredi. Tyrrel, gen. introduct. to the hist. of England.

†Lib. 3. cap. 9. sol. 107.

extolled, not only as providing remedies, and determining, in many cases, where the feudal customs were silent, but on account also of its justice and equity; praises that, it must be owned, do belong to this law where the absolute authority of the prince is not concerned. Foundations for the teaching this law were established in all the universities, and the proficients therein were sure of ample encouragement.*

The popes, likewise, who wanted to set themselves up in the seat of the old emperors, contributed not a little, in those days of ignorance, to spread it; so that it is not wonderful that it got ground in every country almost on the continent; and being melted into, and conjoined with the feudal customs, contributed not a little to the destruction of the freedom of the ancient constitutions. The same method was attempted in England, but not with the like success. The foundation of professorships, the introducing that law, and its forms, into the courts that were more immediately under the king's influence, as the courts of the constable, the admiral, and of the universities, and the high employments its professors obtained, sufficiently show the fondness many of our kings had for it. But the common lawyers and parliament perceived the design, and foresaw the consequences that might follow. Their opposition was steady and successful; and if they did not banish it from the courts wherein it had got footing, at least they so limited and circumscribed it, as to prevent its future progress.

* Giannone's hist. of Naples, lib. 11. chap. 2. Hume's hist. of England, vol. 2. p. 441.

The kings who had any wisdom or prudence, in order to dissemble their real design, gave way to these restrictions, and waited for more favourable opportunities; but the imprudent and haughty Richard the Second avowed himself an open patron to this law. When the duke of Ireland, the archbishop of York, and others his minions, were accused in parliament of high treason, and the evidence being known to be so full as that they must be convicted, he made this weak attempt to screen them. He got his judges, who were his creatures, to declare the proceedings against these persons null and void, as not being regulated according to the forms prescribed by the civil law: but the barons, provoked at such a barefaced attempt, insisted they were regular, as agreeable to their own customs, and declared positively they would never suffer England to be governed by the Roman civil law, and passed sentence of high treason against the judges †.

Whence that king's fondness for this law arose, may be seen from the use he put it to, the protection of the instruments of his tyrannical administration; and from the many wild and unguarded declarations he made, especially that relative to his commons, *that slaves they were, and slaves they should be*, and to his parliament, *that he would not at their request discharge the meanest scullion in his kitchen.* But tho' this prince was pleased to say, that *the laws were in his breath, and that he could make and unmake them at his pleasure*, he did not think the time was come to put that vaunt in execution. He took, therefore, another way of usurping

†Dissertatio Seldini ad Fletam, cap. 7.

the legislative power. Having gained over a majority of the returning officers, and either intimidated or gained over the most powerful of the nobility, he called the famous parliament at Shrewsbury, after having nominated to the returning officers whom they should return; and, as he expected, this parliament, if so it may be called, was complaisant enough to compliment the king with his heart's desire. The former sentence against the judges was reversed, and consequently the civil law set up as the standard in trials of treason. And they indirectly transferred the whole legislative power to the sovereign in the following manner.

As there had been many petitions left unanswered, and many motions undecided, they gave the power of deciding these, or other matters that might arise before the next parliament, to the king, twelve peers, and six commoners. For this committee, they chose such persons, the majority of whom were at the devotion of the king, and gave him and the majority power to fill up vacancies; thereby rendering the calling any future parliament absolutely unnecessary. Thus was the constitution subverted, and in its stead set up an *oligarchy* in appearance, but in truth an absolute monarchy. But as wisely and happily as Richard thought he had conducted this affair, by which he supposed he had gained his long wished-for end, neither the seeming authority of parliament, nor the anathemas thundered in the pope's bull against the contravenors, could satisfy the people that they were not stripped of their ancient rights, or that the king and his committee were rightful legislators. What sentiments the nation entertained appears, from their

deserting him as one man, and following the first standard that was set up against him†.

Since the days of this unfortunate Richard, no king of England hath, in open and express terms, assumed to himself singly the right of legislation. Though James the First plainly claimed it, by implication, in many of his speeches, particularly in those famous words of his, *that as it was blasphemy for man to dispute what God might do in the plenitude of his omnipotence, so was it sedition for subjects to dispute what a king might do in the fulness of his power.* But it would be doing injustice to the house of Stuart not to acknowledge that some of the princes before them, particularly the Tudors, tho' they did not pretend to make laws, yet issued out many proclamations, or *acts of state*, as they were afterwards called, to which they exacted the same unlimited obedience as if they had been laws enacted by parliament. This is a point worthy consideration; for if all proclamations, or acts of the king and his council, require unlimited obedience, it is to little purpose whether we call them laws or not, since such they are in effect. But this, I think, will be pretty plain, if we make a proper distinction between such proclamations, or acts of the king, as are particular exertions of the executive power, which the law and constitution hath entrusted him with, and such as, affecting the whole people, should in any wise alter, diminish, or impair the rights they were before lawfully in possession of.

To give some few instances of the first sort. The

†Bacon hist. and polit. discourse on the laws and government of England, part. 2. ch. 1. and 2. The reign of Rich. II. in Kennet's collection of historians.

appointment of magistrates, the proclaiming war or peace, the laying on embargoes, or performance of quarantine, the ordering erection of beacons in times of danger of an invasion, the granting of escheated or forfeited estates, and many more, are the ancient and undoubted prerogatives of the king alone, and the subject who resists, or disobeys, in such cases, is as much a *rebel*, or disobedient subject, as if these acts were exercised by the whole legislature. But with respect to making general rules and ordinances, affecting the previous rights of the people, the case is very different. For if such were to be universally obeyed, it is equivalent to saying, that subjects have, properly speaking, no rights at all, but hold every thing at the will of the king; a speech which the most despotic monarch in Europe would not venture to advance.

However, I will not carry this so far as to deny that there may cases happen wherein the king may have this right, and wherein his proclamations and orders, even relating to such points, ought to be obeyed. The cases, I mean, are those of a foreign invasion, or intestine rebellion, when the danger is too imminent to attend the resolutions of parliament. In such cases the constitution is, for a time, suspended by external violence, and as *salus populi suprema lex est*, every man is under an obligation to use his utmost endeavours to restore it, and, consequently, obliged to obey him, to whom the constitution has particularly entrusted that care. Instances of this kind did happen during the confusions raised by the houses of York and Lancaster, and the princes were accordingly obeyed. These precedents doubtless gave a han-

dle to their successor, who had no competitors to the throne, to exercise the same power in more settled times. But this was used, at first, in a cautious and sparing manner; and Henry the Eighth, who was a monarch as unlikely to make undue condescensions to his people as ever lived, was glad to derive it from the grant of parliament, that his proclamations should have the force of laws, which was, in truth, giving into his hands the legislative power for life†.

His great successor, Elizabeth, carried this practice farther, and it will be worth while to discover the reason why a people, in ancient times, so jealous of their privileges, should to the one prince explicitly give up, and quietly suffer the other to usurp this power, so essential to a limited constitution. And the cause I take to be the critical state the nation stood in with respect to religion. The bulk of the people, glad to be delivered from the yoke of papal tyranny, and dreading its restoration, were willing to arm their princes with a power sufficient to protect their religion from foreign and domestic enemies; and about religion indeed, this power was at first principally exercised on the footing of the papal supremacy being transferred to the king. Their end was attained: Papists and Puritans were both kept under, and happy in the enjoyment of their religion, they did not consider the consequences; that this very weapon might be used, by a prince of another stamp, to root out the very religion they were so fond of, and that, by admitting this exertion of power in a matter of so high consequence, it would naturally be used in others that appeared of less*.

†Hume's hist. of England, vol. 2.

*Cambden's reign of Elizabeth, passim.

This was what accordingly happened. Proclamations on other points were issued; and monopolies in trade were introduced. All monopolies, undoubtedly were not destructive to trade. Where a new traffick has been discovered, and one that requires a large expence, and is liable to many hazards, it is very reasonable that the first undertakers should have the trade for a time confined to them, that, by the prospect of extraordinary profit, they may be encouraged to promote and settle that commerce on a solid bottom. Such monopolies, instead of hurting, tend to the promotion of traffick, and are not without similar instances in former times, I mean the kings of England appointing the towns for the staple; and had Elizabeth and James confined themselves to the erection of the Russia, the Turkey, and East India companies, and that for a limited term, their conduct would have deserved the highest applause; but that was far from being the case. Monopolies were introduced in the ancient, the most common and most necessary commodities, to the great impoverishment of the nation by the advance of prices.

At first it may seem strange that the wise Elizabeth, who, on all occasions, seemed to have her people's wealth and ease at heart, should follow so destructive a course. But the great end of all her actions was the securing herself on the throne, and one of the principal means she used for that end was the asking money from her people as seldom as possible. Hence proceeded the long leases of the crown lands, at small rents and large fines, and hence all the monopolies, which she sold to the undertakers; but better had it been for her subjects, to have raised the

sums she wanted by an additional subsidy, or an easy tax, than to pay to the monopolists what they had advanced, with their exorbitant profits besides. What Elizabeth began out of policy, James continued, to supply his profusion, to such an extraordinary degree, as disgusted his people, provoked his parliament, and at last made himself ashamed, insomuch that he revoked above twenty. And now no monopoly can be raised but by act of parliament, except in case of a new invention, and that but for a short term of years†.

I come now to the *dispensing power*, another prerogative which the Stuarts claimed, and which cost the last of them the throne. As no state can subsist without mercy as well as justice, the king hath the power of distributing this mercy, and exempting a convicted criminal from the penalty of the law, but this is only where the conviction is at his suit; thus the king can pardon a murderer convicted on an indictment in the king's name; but if he was convicted on an *appeal* by the next relation, the king cannot. The pardon belongs to the appellant. But there is a wide difference between a *pardon*, that is a remission of punishment after the fact, and *dispensing*, which is giving a previous licence to break the law. A general dipensation is, in fact, a repeal, and a particular one is a repeal *quod hunc*, and therefore can belong only to the legislature. The Roman emperors, and the popes, as legislators, assumed this power, and Henry the Third, an apt pupil of his lord and master the pope, introduced the practice into England. In his reign a patent, with a *non obstante* to any law whatsoever, was produced into court before Roger de

†Wilson's life and reign of James I. ap. Kennet.

Thurkeby, and this honest judge was astonished at the innovation, as Matthew Paris tells us in these words: *Quod cum comperisset, ab alto ducens suspicia de prædictæ adjectionis appositione, dixit, heu, heu hos utquid dies expectavimus, ecce, jam civilis curia, exemplo ecclesiasticæ, conquinatur, & a sulphureo fonte rivulus intoxicatur*.*

*Bibliotheca politica, dial. 11. Bacon, hist. and political discourse, part 1. chap. 64.

END OF THE FIRST VOLUME.

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